BRIEF ON BEHALF OF THE PRESIDENT OF THE UNITED STATES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

PURSUANT TO

H. Res. 803

A RESOLUTION AUTHORIZING AND DIRECTING THE COMMITTEE ON THE JUDICIARY TO INVESTIGATE WHETHER SUFFICIENT GROUNDS EXIST FOR THE HOUSE OF REPRESENTATIVES TO EXERCISE ITS CONSTITUTIONAL POWER TO IMPEACH

RICHARD M. NIXON

PRESIDENT OF THE UNITED STATES OF AMERICA

JULY 18, 1974

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EXECUTIVE SESSION

IMPEACHMENT INQUIRY

THURSDAY, JULY 18, 1974

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:25 a.m. in room 2141, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. (chairman), presiding.

Present: Representatives Rodino (presiding), Donohue, Brooks, Kastenmeier, Edwards, Hungate, Conyers, Eilberg, Waldie, Flowers, Mann, Sarbanes, Seiberling, Danielson, Drinan, Rangel, Jordan, Thornton, Holtzman, Owens, Mezvinsky, Hutchinson, McClory, Smith, Sandman, Railsback, Wiggins, Dennis, Fish, Mayne, Hogan, Butler, Cohen, Lott, Froehlich, Moorhead, Maraziti, and Latta.

Impeachment inquiry staff present: John Doar, special counsel; Albert E. Jenner, Jr., minority counsel; Samuel Garrison III, deputy minority counsel; Bernard Nussbaum, counsel, and Richard Cates, counsel.

Committee staff present: Jerome M. Zeifman, general counsel; Garner J. Cline, associate general counsel; Alan A. Parker, counsel; Daniel L. Cohen, counsel; William P. Dixon, counsel; Arden B. Schell, counsel; Franklin G. Polk, associate counsel; Thomas E. Mooney, associate counsel; Michael W. Blommer, associate counsel.

Also present: James D. St. Clair, special counsel to the President; John A. McCahill, assistant special counsel; and Malcolm J. Howard, assistant special counsel.

The CHAIRMAN. The committee will come to order.

Before proceeding with the response by Mr. St. Clair,[1] the Chair would like to make several announcements.

Following the response by Mr. St. Clair, it is hoped that we may be able to take care of a few housekeeping matters that I think can be disposed of during this morning's session. I understand that these matters, such as the release and public indication of further materials, may be disposed of under the rules at this phase of the proceeding, but it is still a hearing and doesn't necessitate a meeting.

[1] James D. St. Clair, Special Counsel to the President, was present throughout the committee's consideration of evidence in May and June, 1974. On June 27 and June 28, 1974, Mr. St. Clair responded, in the same form and manner as the inquiry staff's initial presentation. Between July 2 and July 17, 1974, Mr. St. Clair participated in the interrogation of the nine witnesses heard by the committee. On July 18, 1974, Mr. St. Clair made an oral summation to the committee. He subsequently submitted two documents—a "Brief on Behalf of the President of the United States" and "An Analysis of the Scope of an Article of Impeachment." Mr. St. Clair's summation and the documents which he submitted are printed in this volume as part of the record of the committee's proceedings.

Then there are several other matters that I would like to discuss with the members on a very informal basis, so I would hope that we would remain behind after Mr. St. Clair leaves, just to provide some information regarding some of the proposals that I have which I think are within the jurisdiction of the Chair to merely offer as proposals as to the procedures that are intended to be followed next week during the course of what we consider the debate on the resolution and consideration of any resolution which we may have before the committee as a committee.

I might also add that at this time, the Rules Committee is meeting to consider a change in the rules of the House providing for the allowance or permission of live television to come into the proceedings, and any member that would like to go there to express himself one way or the other, I notify him for that reason. But I am advised that the leadership has scheduled this and it is before the Rules Committee this morning. So that in the event that such a rule is adopted and the House does then formally adopt that change in the rules of the House, then the committee could properly have before it, as has been expressed by some of the members, a desire to have a resolution which would permit live television to come in and to telecast our proceedings.

I mention this so that the members will know what is taking place.

Now, before calling on Mr. St. Clair, Mr. Doar, you have a matter that I think is of some importance to us to know about and then following that, I think we will hear from Mr. St. Clair.

Mr. DOAR. Mr. Chairman, I would like to report to the members of the committee with respect to the subpena, the President's response to the subpena issued by the committee on the 24th day of June, returnable on the 2nd of July and actually responded to because the President was out of the country, on the 12th of July. Briefly to refresh the members' recollection, the subpena called for certain recorded conversations between the President and some of his key associates, particularly Mr. Colson, Mr. Haldeman, and Mr. Ehrlichman in the summer of 1971, and a conversation between the President and Mr. Petersen in April of 1973, and the President and Mr. Kleindienst in April of 1973. President Nixon declined to supply, produce the tape-recorded conversations or copies of the Presidents' daily diaries which we requested in the subpenas dated June 24th. This was, the President had advised the committee theretofore that that would be his position with respect to Watergate and these recorded conversations dealt with the plumbers activity in the Ellsberg case in the summer of 1971.

However, the position of the President was the same. There was no elaboration in the position and you have been furnished a copy of the letter.

With respect to the news summaries, the President did furnish a number of news summaries for the period March through June 1972, but the news summaries which were furnished were copies that didn't have any of the President's notes on them.

The third matter that I wish to report to the committee about is we asked for certain documents in the files of a number of men in the White House, including Mr. Ehrlichman, and specifically, we asked for handwritten notes of Mr. Ehrlichman produced by the White House on the 5th and 6th of June to Judge Gesell in the case of *U.S.* v. *Ehrlichman.*

On the 15th day of July, we received at about 4 o'clock in the afternoon, at our office, a package of material from the Special Prosecutor's office. At about the same time on that day, or maybe a little earlier, I received personally from Mr. St. Clair a package of material. Examination of this material indicated that both sets of material were the handwritten notes of Mr. Ehrlichman for a period from June 17 through May 1973. The package that was delivered by the Special Prosecutor was apparently delivered to us by mistake. There had been an exchange of telephone calls between some representative of the White House and some representative of the Special Prosecutor's office, and as I understand it second hand, the White House person had asked that those notes or a Xerox copy of the notes be returned so that they could use them in preparing the material that the White House was going to submit to the committee.

The instruction was misunderstood and the person at the Special Prosecutor's sent the notes to the committee.

Well, the point of all this is that there are about twice as many blank pages on the material that was sent by Mr. St. Clair to the committee as there were on the material that was over in the Special Prosecutor's office. We have not had a chance to analyze all the material but to give the committee just a rough idea, we received from the White House 175 pages of material, 88 pages of which are blank, and we received the same set of material from the Special Prosecutor. It was 181 pages, 40 pages are blank. If you count the number of lines and notes in the material from the Special Prosecutors, there were 1370 lines of notes and in this, what we received from the White House, there were 643 lines of notes.

Now, our preliminary examination of these two sets of materials indicate that there was blanked out of the material furnished to the Judiciary Committee a considerable amount of material with respect to President Nixon's discussions with John Ehrlichman on the subject of the Ellsberg prosecution. There were also a number of other things eliminated.

I call this to the committee's attention pursuant to the instruction of the Chairman and as soon as we can in a careful way, we will make this material available to the committee, what we think is the relevant material, and indicate where the relevant material had been excluded from the material which was furnished by the White House to the committee.

Mr. McCLORY. Mr. Chairman, could I ask counsel this question?

Do I understand that the material which you received from the Special Prosecutor, which apparently the committee received by mistake, will be included in the material that you will furnish to the members?

Mr. DOAR. Oh, yes, sir. It is just so bulky that to furnish it all to you without some kind of analysis and guidance is just impossible.

Mr. McCLORY. And then also——

Mr. DOAR. I would say to the members that we do have three copies of that made and that both sets of it will be available for inspection by the members if they want to get an idea, just to go through it and follow it on.

Mr. McCLORY. Then the material that the committee members will get, we will get both versions?

Mr. DOAR. That is correct.

I wonder, really, whether the committee members would want me to make 38 copies of each version. That is an awful lot of Xeroxing. I would think that it would be practical if we had copies available for inspection. If the members want it, we, of course, can do that, but we would call attention of the committee members to the relevant portions of the material and indicate——

Mr. BROOKS. Will counsel yield?

Mr. Chairman?

Mr. McClory, do you ask to make that a part of the record? That is what you were doing, but you were just talking about——

Mr. MCCLORY. I would be interested in having the relevant materials made a part of the record and made available to the committee members. I don't want to insist on having 38 copies——

Mr. DOAR. We will make it a part of the record, we do make it a part of the record, ask that it be made a part of the record.

Mr. RAILSBACK. Mr. Chairman——

The CHAIRMAN. I think frankly that this item that is being called to our attention is very pertinent for the reason that here we have before us materials which were sent to us by the White House after we had subpenaed those items and the materials that were furnished to the prosecutor, but on examination—and I don't suggest that we in any way again attribute any motivation or anything of the sort, but on examination, there are a number of blank pages in the items—in the set of notes that we have received and I have examined some of the notes.

I might say that on examination, a very cursory examination, I think that some of those matters are rather pertinent and relative to this inquiry. Yet they are not contained in the set of notes furnished to us, but they are contained in the set of notes which the Special Prosecutor has. And I think that this ought to be a matter that the committee ought to properly examine.

Mr. MCCLORY. But, Mr. Chairman, how are we going to get this? I want to look at this material. How am I going to look at it?

Mr. DOAR. It is available to you over at the——

Mr. MCCLORY. OK.

Mr. DOAR. Or we could furnish it to you.

Mr. MCCLORY. That is satisfactory to me.

Mr. BUTLER. I would like to ask counsel, were either one of these things accompanied by a covering letter?

Mr. DOAR. The material that Mr. St. Clair gave to us was accompanied by a covering letter and the other material was accompanied by a covering letter.

Mr. ST. CLAIR. Mr. Chairman——

Mr. BUTLER. I am sorry, I yield to Mr. St. Clair, if that is appropriate.

Mr. ST. CLAIR. May I, sir?

The CHAIRMAN. Certainly.

Mr. ST. CLAIR. As I explained to Mr. Doar and I think to Mr. Jenner, the production of materials to Judge Gesell was essentially in two phases. The first phase was handled by Mr. Buzhardt. When he had his heart attack, which was very sudden, we were unable to ascertain

precisely what he had furnished. For that reason, we asked the Special Prosecutor's office to give us copies of what they had so that we could furnish the complete set to this committee. Somehow or other, that material or that message got confused. They sent it here, we have no objection to that. All I want to do is be sure we have a copy of everything you have. Our intention of asking the Special Prosecutor to give us a copy, and we have done this before, in connection, I think, with some of the plumbers documents, is to be sure that you have what they have. When we did that, we did that for the purpose of getting the complete set to send to you and keeping one for us. That is the explanation for this. They apparently just sent it over here.

As I say, we have no objection to that. Except I want to get a copy of whatever they have.

The CHAIRMAN. It will be made a part of the record.

Mr. BUTLER. Mr. Chairman, I thought I still had the time.

The CHAIRMAN. Yes, Mr. Butler.

Mr. BUTLER. I am satisfied with that explanation of how this error arose and I would think that it would be appropriate for us as a committee to proceed with the examination of all the evidence that has been brought to us from the Special Prosecutor in regard to this. I would like to request counsel, for my purposes, it would be far more appropriate to have the benefit of a digest or a summary in as concise a form as you can, hopefully participated in by a member of the minority as well as Mr. Doar's staff. And so that we can be assured that the digest meets our requirements of objectivity.

Mr. LATTA. Mr. Chairman.

Mr. EDWARDS. Mr. Chairman.

The CHAIRMAN. Mr. Edwards.

Mr. EDWARDS. Mr. Chairman, I would like to ask counsel, Mr. Doar, did the letter of transmittal from Mr. St. Clair explain that this was a partial distribution to us and that the White House was awaiting the material from the Special Prosecutor so it could supplement the delivery to us so that we would have the full amount delivered to the Special Prosecutor?

Mr. DOAR. No, it did not. It said that——

Mr. EDWARDS. It inferred that this was a final delivery to the Judiciary Committee?

Mr. DOAR. Yes, it said, "We are furnishing those parts of Mr. Ehrlichman's notes that were furnished to Mr. Ehrlichman pursuant to Judge Gesell's subpena."

Mr. EDWARDS. Thank you.

Mr. LATTA. Mr. Chairman.

The CHAIRMAN. Mr. Latta, I will recognize you. Then I think we have to recognize Mr. St. Clair so that he won't be interrupted by any of the proceedings of the House.

Mr. LATTA. I recognize that fact, Mr. Chairman. But apparently, this is of such importance that it has taken up quite a bit of the committee's time this morning. I feel as one member of this committee that I have had enough deletions and so forth that I want to see the entire thing. I think the American people want to see the whole thing. So I would hope that we will not get any abbreviated summary from anybody, that it will be inserted verbatim, word for word, in the hearings of this committee.

The CHAIRMAN. It will be made part of the record, part of the hearings.

Mr. SEIBERLING. Mr. Chairman.

Mr. MARAZITI. Mr. Chairman.

The CHAIRMAN. I am going to proceed now.

Mr. MARAZITI. Mr. Chairman, on the procedure, may I be recognized on the procedure?

The CHAIRMAN. No, I am going to recognize Mr. St. Clair, out of deference to Mr. St. Clair. He is going to take at least an hour and a half. We will be going to the floor—I understand there are plenty of amendments——

Mr. MARAZITI. I want to be heard on this procedure of listening to Mr. St. Clair.

The CHAIRMAN. The gentleman is out of order.

Mr. MARAZITI. I want to be heard on this procedure. I raise a point of order.

The CHAIRMAN. I am sorry, the point of order is not in order.

Mr. MARAZITI. I want to raise a point on the procedure of Mr. St. Clair going first. I want to be heard on it.

The CHAIRMAN. Mr. Maraziti, I am sorry, but you are out of order. Mr. St. Clair has been invited to present the response. There is no other order than the invitation of Mr. St. Clair to make this response.

Mr. MARAZITI. May I ask one question, Mr. Chairman, on the procedure——

Mr. SARBANES. No, no, regular order.

Mr. MARAZITI. I think I am entitled to be heard.

I raise a point of order, Mr. Chairman.

The CHAIRMAN. What is the point of order?

Mr. MARAZITI. The point of order is I want information on the procedure that this committee is going to follow on listening to counsel, counsel for the President, counsel for the committee. I want to know if Mr. Doar is going to make a presentation to the committee following Mr. St. Clair. That is all I ask.

The CHAIRMAN. That is not the case. Mr. St. Clair is making a response this morning.

Mr. MARAZITI. The point I wanted to make is I think it is not the logical procedure for the negative side to make a response until the affirmative has come forward and stated its points and its programs. Then there is a response to that. That is a recognized method in any kind of procedure, any kind of debate——

Mr. BROOKS. Regular order, Mr. Chairman. I demand regular order. I am tired of this. Let's get with it. We have got this man here. Let's hear him and quit arguing and squabbling. I am sick of this.

The CHAIRMAN. Mr. St. Clair.

Mr. St. Clair, you take the time that you want.

Mr. ST. CLAIR. Thank you, Mr. Chairman.

The CHAIRMAN. I would hope that the members of the committee would not interrupt Mr. St. Clair until he has completed his response.

Mr. DONOHUE. Do I understand when you say a response that this is not going to be a summation of all the evidence or an argument as we usually have connected with a trial?

Mr. COHEN. Regular order.

The CHAIRMAN. We have invited Mr. St. Clair to present an oral response.

Mr. St. Clair, will you proceed?

Mr. ST. CLAIR. Thank you, Mr. Chairman, members of the committee.

I think I would be less than candid if I didn't indicate to you the enormity of the responsibility that I feel in regard to this matter, representing as I do the President of the United States in a proceeding that, fortunately, is reasonably unique in our history. Frankly, the enormity of this responsibility sometimes seems to be, to me at least, somewhat overwhelming. I doubt very much if I can adequately, in the time that I contemplate using or in fact, in any time, fully acquit my responsibility in such a tremendously important proceeding. I hope you will bear with me. My only consolation is that I think that the enormity of this responsibility is even greater on your shoulders. After all, when I am through, I can get up and I can walk out that door. But you are going to have to sit here and you are going to have to make some very important decisions. And you are going to have to be counted with respect to those decisions and they are not easy. And they are not solely legal decisions. They are as much political as they are legal.

I would only say this. I am not a person that is skilled in the art of politics. I can only say this, that I think the American people will expect that this committee would not vote to recommend any articles of impeachment unless this committee is satisfied that the evidence to support it is clear, is clear and convincing. Because anything less than that, in my view, is going to result in recriminations, bitterness, and divisiveness among our people. And this will not be good for the United States of America.

So when I say I feel an overwhelming responsibility, I can only say, well, at least I can walk out that door and I think that you have even a greater responsibility and as we have been here in the last 9 or 10 weeks, I have seen nothing to indicate to me that you are not well aware of precisely what I am talking about.

Now, in the next hour or so, and I hope not to run much over an hour, Mr. Chairman, I am going to try to summarize briefly my views with respect to the evidence and what it means as I see it. Obviously, I am not going to try to cover every piece of evidence on each of the major areas covered by the staff report and our supplemental report. To do so would take days, not hours.

Furthermore, I fully recognize that each one of you is a lawyer and that we can engage in a great deal of shorthand between us so that I don't have to fully elaborate all of the matters. Everyone has sat through virtually every session, running sometimes late in the evening, so that I am sure that you will understand in substance what I am trying to say in the course of this response.

Of course, evidence, or, as we call it, information is the basis upon which any decision can be made. No political decision, in my view, can be made divorced from the fundamental facts. This committee properly, in my view, has seen fit to publish the great mass of material that your special staff has gathered together. The full impact of that will not really reach all of the American people or, to that ex-

tent, the American people who will have no awareness, for several weeks. So you have to sit here, really, as the surrogates for the American people. You know what this evidence is. You have to frame a judgment with respect to it, knowing full well that the American people may well second-guess you.

An inference piled on an inference will not do, ladies and gentlemen, in these proceedings, any more than they would in any other proceeding. An inference drawn one way where the opposite inference is just as logical will not do. You know that and I know that. The information in my view, must be clear and it must be convincing before the major surgery that would be tantamount to a vote to recommend an article of impeachment.

For example, a major effort has been made by the staff—and I am not at all critical of them; that is their duty—to suggest to the committee that everything that Mr. Haldeman knew, ipso facto, the President knew. Well, that is an inference. I would suggest there is no evidence to support it, and in fact, the weight of the evidence would seem to contradict it.

First of all, consider the function of the principal aide to a President. Is it simply to regurgitate and pass through everything he gets? If that is the function of the principal aide to a President, he doesn't need one. This particular aide was one that, as Mr. Colson described him—and I think it was confirmed by Mr. Mitchell—was in the habit of filtering out information he thought not appropriate. And in fact, Mr. Colson said that was not uncommon for other aides in the White House. We may have our views with respect to the propriety and the wisdom of this, but the fact is that Mr. Haldeman did not pass everything to the President that he was aware of.

For example, Mr. Butterfield, I think, was the first witness. He testified that by virtue of his position with respect to the flow of information in and out of the Oval Office, he felt that he had a very good reading, as I think he put it, on the information that was passed to the President by Mr. Haldeman. Despite the relatively short time that he said he spent with the President, nevertheless, he indicated to you that he felt he had a good feel for it.

Specifically, as it relates to the issues, then, in this case, you will recall, I am sure, that Mr. Butterfield testified that despite this feel for the informational flow to and from the President, he never heard of any alleged coverup of the Watergate break-in. Well, now, if he had such a feel and he never heard of that, then it is obvious that Mr. Haldeman did not pass any such information to the President, even if he had it.

Furthermore, if we assume, just for the purposes of this argument, in fairness to Mr. Haldeman, he was involved in a conspiracy to obstruct justice, what objective would be served by informing the President of that fact? In fact, I think as Mr. Henry Petersen indicated in his testimony, that would probably be about the last person that should be told. And this record is replete with conversation with respect to keeping it away from the President, getting him out above it, words to that effect. As I recall, John Dean, himself, on April 16, in discussing matters with the President, said, in substance, "I have never passed anything to you, Mr. President, that would involve you personally."

So I suggest to you that if you in your deliberations conclude that it is essential to making out a case that would justify a vote recommending an article of impeachment that Mr. Haldeman infrequently passed everything he knew to the President, the record will not support that finding and the matter of commonsense would not support any such finding.

Take, for example, testimony yesterday with respect to commitments to ambassadors. It is quite clear from that testimony that Mr. Haldeman wasn't even supreme in some areas, even though he was Chief of Staff. However, I would like to deal more specifically now with some of the issues. As I say, I don't intend to deal with all of them, but I have selected what I believe to be the principal ones and briefly would like to deal with some of those.

First, the issue identified as ITT. Originally, as this issue developed, as I view it, it was a suggestion that a contribution made by the Sheraton Corp., a subsidiary of ITT, to a governmental agency of the city of San Diego in the amount, I believe, of $100,000 with a conditional commitment for an additional $100,000, occurred in juxtaposition of time in such a manner that at least one newspaper reporter was led to conclude that that contribution was made in consideration for the settlement of the three ITT cases which were settled at or about that time. Now, it was clear from the evidence, and you have the benefit of a tape recording of a Presidential conversation with Mr. Kleindienst, which stated in very clear, unequivocal terms, that the decisions with respect to ITT in connection with the prosecution of that appeal, as far as the President was concerned, were a matter of policy and he wanted his policy carried out. Right or wrong, that was his policy and he was the elected official that was to carry it out and he took a dim view of those who didn't carry out his policy. You will recall that advice given to him by Mr. Mitchell that he ought not to interfere with the Department of Justice prosecution of these cases was adhered to by the President and a couple of days later, he reversed that instruction. But it was clear in the course of that conversation, an unrehearsed, unstructured conversation, that his decision had nothing to do with Mr. Geneen or any contributions of any nature. And I think essentially, this was recognized.

Then the question arose, well, maybe the President was aware and should have taken steps to either remove Mr. Kleindienst or take some effective steps because of Mr. Kleindienst's testimony in his nomination proceedings—or his confirmation proceedings, excuse me—that he was not in any way importuned by the White House in connection with the settlement of the ITT cases. Now, you have to keep in mind that the context of Mr. Kleindienst's testimony was the settlement of the ITT cases. It was not whether or not to drop the appeal from the adverse decision. Quickly, the settlement, all agree it was a good settlement. The testimony is that Mr. McLaren negotiated it without any interference from anybody, even from Mr. Kleindienst. So the fact of the matter is that the settlement was not in any way involved with any importuning from the White House. And even Mr. Kleindienst, in his explanation of his testimony, said, in the context that I thought I was testifying, I didn't consider that I said anything untrue, because in fact, as far as the settlements were concerned, I received no inter-

ference from the White House. And Judge McLaren himself confirmed that.

So that it seems to me quite clear that there is no basis for believing that the President would be any different than the witness himself, that he would view this in the same context as the witness himself; namely, did the President in any way interfere, direct, or otherwise importune Judge McLaren or anyone else regarding the settlement of test cases? And the answer is he did not, and there is no evidence that he did.

Now, the next item I have undertaken to review is the dairy industry investigation. Here, we, I think, are advised that the initial approach with respect to these contributions was from AMPI, and I will refer to it as AMPI, indicating that they desired to contribute money to the President's campaign. In fact, I think there had been further overtures in connection with the 1970 congressional election. Now, it seems to me that the evidence in this instance, in this investigation, discloses nothing more than the normal political process of receiving contributions from interested people. It does not mean that if someone votes or takes action consistent with the desires of its contributors, that that person, be he a President, a Senator, or a Congressman, is guilty of receiving a bribe. By no means. To hold otherwise would strike a fundamental blow at our way of life. The situation here, it seems to me, is quite clear. Again, you have the benefit of a tape of the actual decision, of the discussion between the people who made that decision, the basis upon which they made it, an unusual opportunity. As we lawyers know, you seldom have the opportunity to sit in at the decisionmaking process. And in that decisionmaking process, you recall as well as I what the principal elements were.

Mr. Connally outlined for the President in some detail the plight of the dairy farmer, the importance of the industry, the congressional status of legislation that would have affected the same result, similar and it was concluded, and I think rightly so, that this was going to happen anyway; that perhaps maybe we can get a 2-year coverage without any further increases, but since it is the wisdom of Congress to raise the price support levels, then the administration probably has no choice. The matters of judgment involved as to whether or not production would be increased or decreased by a quota were admittedly close questions of judgment. You may recall the meeting with the Secretary, the President, and others with members of the industry earlier on the same day.

The Secretary indicated, this is a close question of judgment, and there was some judgment as to what will affect or what will happen with respect to production. Will there be overproduction, and so forth? And members of the industry gave their reasons why an increase would be an appropriate thing to do.

So that we have the decision. We know the basis for it, and we know that the decision was not in any way conditioned upon any contributions made by this group and similar dairymen's groups. And the basis of the decision did not admit of any change or variation in that decision depending on whether or not the dairymen's groups would reaffirm or not reaffirm their pledges. The basis of it was the congressional attitude, the importance of the matter, and other similar bases. Whether or not Mr. Nelson, if he was the one, said we reaffirm, had

reaffirmed or not reaffirmed, the decision would have been the same. Therefore, there could not have been any quid pro quo, as we say, for this decision. It was not made on the basis of contributions.

And if you look at the history of the administration with respect to the milk group, it is very hard to conclude that the administration in fact showed them any favors without regard to what prior administrations did or didn't do. I am not concerned. I am concerned about this administration.

The import quotas were not reduced to zero on all the products that the dairymen's group wanted them to be reduced, even though there was a Tariff Commission recommendation to that effect. This is hardly the conduct of an administration that seeks to conduct its policies in consideration of any contributions. And I thought the crowning blow was that even after they had made substantial contributions, the administration prosecuted the organization for violation of the antitrust laws. Hardly the conduct of an administration that is currying favor with a large contributor.

Now, we all have our views, I am sure, about the modern day feasibility of such large contributions. That is a legislative matter to which the legislature, I am sure, has and will direct its attention. But I submit there is no evidence that would warrant a vote recommending an article of impeachment in connection with the dairy investigation. Any more than there would be discredit for any other recipient of that and similar types of contributions, not only from dairymen's organizations but from labor unions and other types of organizations.

As I said at the outset, to me this seems to be the normal political process as we have known it. It may not be correct, it may not be wise, it may be wise. A lot can be said on either side. But surely, there is no basis for an article of impeachment arising out of the dairy contribution investigation.

Passing, then, to an entirely different subject, if I may, the President's personal income taxes. First of all, there was some suggestion that he asked that the joint committee audit his returns because he was running away from an IRS audit. I think the evidence clearly destroyed any such implication. That would be like jumping from the frying pan into the fire, in my view. The obvious reason, as counsel for the President indicated, was to avoid any inference that he was controlling the agency that was auditing his returns. May I say I am not familiar with a more complete audit of anyone's tax returns than the President went through, the most searching audit, I think, that probably any taxpayer ever had. And may I say—not in any complaining tone, but may I say that I think most of the judgment issues, if not all, were resolved against the President.

At the time this evidence was being considered, I said to myself, facetiously, I will agree, I don't think I would mind having the President's case in a tax court on a contingency basis. I think he had a good case on the law. If you will read the briefs that were supplied to the joint committees by counsel for the President, you will see readily what little it takes to effect a gift and, in fact, the agency here involved has determined that a gift was made. I have never been able to figure out how a gift can be made, the President can't get back his papers, but he is not allowed to have the deduction. However, it was not my func-

tion to pass judgment on that decision. The President made a decision. He would submit his returns to the joint committee, and he must live with that result.

All I am saying is this, that it would be inappropriate in the extreme, in my view, to suggest that he had an incomplete audit; that it was in any way designed to avoid responsibility for taxes.

Finally, with respect to the good faith of the President in terms of fraud, first of all, the record is clear that there is a determination that he was not guilty of fraud. A negligence penalty was assessed and you don't assess a negligence penalty if there is any basis for a claim of fraud.

Second, however, I think we can all see what in fact happened. Perhaps it has happened to us or some of our clients. A tax return is prepared on information furnished to the prepared by a number of different sources. It is brought in in a rather ceremonial proceeding. As Mr. Kalmbach indicated yesterday, the firm was very proud of preparing the President's return and he showed up to participate in the ceremony. And it was largely ceremonial. I think he said that Mr. DeMarco stood next to the President as they flipped through the return, spent, I think he said, 10 to 15 minutes, if I remember his testimony; that there was some discussion in generality with respect to the major items. But most importantly, during the course of that conversation, Mr. DeMarco advised the President that he had a good tax shelter for the next period, I guess, of 5 years. That appears in the materials submitted by your special staff and was confirmed last night by Mr. Kalmbach.

So here you have a President whose lawyer advises him that he has a good deduction. There cannot be a basis for a claim of fraud against the President. Whatever may be the circumstances with respect to the preparers will be determined, presumably, in due course by proper agencies charged with the responsibility of investigating. But clearly, there is no basis for a charge of fraud against the President of the United States.

Somewhat related only in the subject matter, but not in terms of any Presidential involvement is the charges with respect to the Internal Revenue Service and allegations that the Internal Revenue Service was used to either punish or harass political "enemies." Mr. Dean's testimony established, as I understand his testimony, that it was on September 15, 1972, that the President spoke to him about utilizing the IRS and that if he didn't get any place in his efforts, the President—he, the President—would see that Mr. Shultz did what he was told, or words to that effect. Let's keep in mind, first, that Mr. Shultz was appointed by the President, as was Mr. Walters. Let's also keep in mind that Mr. Dean's approach to the IRS in fact took place before this meeting of September 15—exactly, I think, September 11—during the course of which Mr. Dean advised Mr. Walters that he was not appearing there at the request or on behalf of the President. What thereafter happened was a phone call, as I understand it, by Mr. Dean, or perhaps a visit, wondering how the so-called enemies list was getting along, and he was led to believe that nothing was being done, and in fact, nothing was being done.

To show you how ridiculous it is to suggest that the administration was able to manipulate the Internal Revenue Service, consider, if you

will, the case of Mr. Green, a reporter for Newsday magazine. There is some evidence to the effect that Mr. Caulfield made an approach to someone in the Internal Revenue Service to investigate Mr. Green's returns. Mr. Caulfield was advised, we will not do it; if you want to have that done, you can file an anonymous letter such as any citizen can do.

So here you have the administration reduced in its influence on the IRS to having to write anonymous letters to the IRS. The fact of the matter is, as we know, no returns were audited as a result of Mr. Dean's efforts. The Joint Committee investigated the matter thoroughly and so found.

It is quite true that Mr. Ehrlichman talked with Mr. Shultz about Mr. O'Brien's return. You will recall that the audit of Mr. O'Brien's return had been completed, that Mr. Ehrlichman was dissatisfied with the result, that he suggested that the IRS was picking on Republicans and not Democrats. But what happened? Nothing. There is no evidence whatsoever that Mr. Shultz was in any way importuned by the President to do anything about the enemies' list, to harass anyone through the IRS, and in fact, none was done.

There was some suggestion that perhaps a friend or friends of the President might have had a tax break. One I can remember immediately is John Wayne, I believe to be an actor. The fact of the matter is that the auditor, the audit of Mr. Wayne went right ahead without any result by reason of inquiry of the White House whatsoever.

The present commissioner is also an appointee of the President. So here you have appointees of the President, I submit, conducting the affairs of the IRS in a manner that we would all be proud of. And to suggest that this would constitute a basis for impeachment of the President flies in the face of fact.

We are not here to impeach John Dean or even Mr. Ehrlichman. The question before you is, Are you going to vote for articles of impeachment of the President of the United States? And you are going to have to, as I have indicated earlier, satisfy yourselves that there is information—not guesswork, not supposition, but information—that would justify that action. Because the American people are going to know what that evidence is. They are going to have a feel for it. We as lawyers know how cases feel. You can feel a case in a courtroom. And I think you and I know this case feels in this courtroom.

Now let's go on to the plumbers matter, the Ellsberg case, and wiretaps. Put these all together, because they all relate to the same general subject matter, namely, what I think is fairly apparent, that at least the administration thought it was faced with a crisis in the conduct of the affairs of this country by extensive leaks in newspapers relating not only to the Pentagon papers but to the India-Pakistan relationship, the Okinawa decisions and negotiations with Japan, the SALT negotiations, and perhaps others. And it was demonstrated, I think beyond question, that these matters were periodically appearing in the press. Now, we can blame the press if we want, but we really have to bring the blame on individuals who give this information to the press. And for my part, it would seem to me the information would suggest that if the President stood idly by and did nothing about the circumstance of this situation, and if these conditions continued, that in turn might well have been justification for an article of impeachment.

I cannot conceive how the Chief of State of this Nation could not be concerned by these revelations, and our learned friends from other nations read these newspapers assiduously, I am sure. Each of the wiretaps involved was authorized not only by the Attorney General in writing, but by Mr. Hoover, the head of the FBI.

So criticism was directed to the fact that nothing worthwhile was produced by the wiretaps. First of all, I think that is inaccurate in terms of the information. There is evidence that one individual who was described as the source of a leak, was discharged. In our submission, I think, he was designated by the letter "L," and Mr. Hoover was so advised in writing. We do know that another individual who had extensive exposure to sensitive material was removed from security clearance.

If only one of those things happened, or in fact if none of them happened, clearly, the situation called for action on behalf of the President, and he took such action.

We expect Presidents to do such things. We expect Presidents to take action that he thinks in his judgment is sound to protect this country. And as I say to you, if he had not done these things, that in turn might well have been a basis for severe criticism of the President.

Now, as far as the Pentagon papers are concerned themselves, the fact that such matter was published, I think, would disturb a number of us. Without intending to analyze the papers and so forth, which would take days and weeks, I would say that it is not unreasonable that a President and his principal foreign policy adviser were very upset that this could and did happen. The individual who did it was actively engaged in promoting the justification for his conduct, and I am not passing judgment on it except in a personal manner. But he undertook to justify in the public media his conduct. Is it inappropriate for the President to suggest that maybe it was inappropriate in the same public media? What in effect really was contemplated here was a congressional investigation, with the informing power of the Congress to be utilized to advise the American people of the seriousness of this material, the seriousness of the act, so as to discourage others from doing the same, and to indicate to the American people the nature of what was going on.

Now, as far as Mr. Ellsberg personally is concerned, Mr. Colson, I think, testified at some length with regard to the administration attitude toward the man. Mr. Colson, very frankly—I really don't quite understand what it was he thought he was pleading guilty to, because I think it happens every day that people disseminate information derogatory of other persons. That is the American way of life. We have the freedom of the press and all of us are the recipients of it. The whole Ellsberg matter, it seems to me, is a lesson in what can happen if an administration does permit this type of thing to go on unabated. And if Mr. Ellsberg sought to set himself up as a hero seeking support and perhaps similar conduct from others, I fail to see how an administration can be criticized for taking him on, for criticizing him, for pointing out who he really is, what he has really done.

With respect to the President's activities in this regard, it seems to me that Mr. Petersen indicated quite clearly that as far as the Fielding break-in is concerned—and may I add parenthetically, there is absolutely no evidence that the President knew about that in ad-

vance. His own unrehearsed statements in the course of recorded conversations make that clear. Mr. Ehrlichman's suggestion that he may have files in the face of even Mr. Ehrlichman's testimony. Mr. Ehrlichman said he didn't know about it in advance. The President thought it was a fairly stupid thing to do. But the President was firm in his resolve that these leaks were going to stop and he intended to exercise the full authority that he had as President of the United States to see that they did stop. And may I say, apparently, he was reasonably successful in this regard.

Now, when the Fielding break-in came to the attention of Mr. Petersen, the President indicated to him that this was a national security matter. Now, I think you have to consider the activities of the Plumbers in this respect. It is clear that the Plumbers were not only interested in Ellsberg and the Pentagon papers—they were interested in that. But it can now be disclosed that they also were very actively engaged in the Radford investigation, which is a very sensitive matter. They were also engaged in investigations involving drug traffic and perhaps others. So that if investigations went to the Plumbers unit, it could not help but spread into these other matters. And that is what the President said when he said, this is a national security matter.

The President felt quite strongly about that and I suggest it is a reasonable position for him to take. However, Mr. Petersen felt that when the knowledge of the break-in became known to him, while it may not be a requirement as a matter of law that that be disclosed, because in fact, no evidence was tainted as a result of that break-in, but as a matter of prudence, it was recommended to the President that that be disclosed to the court, the President without hesitation agreed. Again, it would be hard, in my judgment, to fault a President for his conduct in this matter.

Now, I am not going to argue that the President, in fact, or any of us are perfect in every respect. We are not; nor is he. But it takes a great deal of imperfection, and we have argued to this committee it has to be of serious criminal nature, before the American people will see their President impeached.

So that as I see it, the circumstance that the administration was faced with at that time, and we have to remember that these were very serious times as far as the foreign relations of this country were concerned, took effective steps to control the situation. Now, as I said, I don't contend that the President is perfect. I think he would be the first one to admit it. I suggest, however, that in appraising his conduct, we do just that. Let us appraise his conduct, not what he says. If we were all to be held responsible essentially in a criminal matter for everything we said in terms of frustration, anger, conversation with friends and so forth, there wouldn't be enough jails to hold us all. Let's judge the President on what he did. And I suggest to you that he effectively dealt with this dangerous situation.

Now, I would like to devote the balance of my time to the Watergate matter, because I believe that this is fundamental to these proceedings. Obviously, there are matters I have not dealt with at all—the Cambodian bombing, the impoundment of funds, and perhaps other matters. The chairman has indicated graciously that we may file briefs on not only these matters but others, and we intend to do so

within a day or two, and I will have to rely on my brief. But I would like now to address myself to the Watergate, because as I say, I don't think we would be here if it were not for this unfortunate event.

In June of 1972, a break-in occurred in the DNC. Mr. Colson, I think, aptly described it as politically as inept a project as could be imagined. In any event, it happened. It happened that one of the individuals arrested was also on the payroll of the Committee To Re-Elect the President. It also happened that either he or another person had on his person identification that indicated a connection with Mr. Hunt.

The first question that the American people have been wrestling with now for, I guess, more than 2 years is did the President have any prior knowledge of a plan to break into the DNC? And I submit there is not the slightest evidence that he did. It would fly in the face of just plain commonsense in the first place. In the second place, his own statements made at times in recorded conversations, when it would be not thought that they should be structured or rehearsed or anything, make it quite clear that he didn't know anything about it, that he thought it was a stupid thing to do; that his reaction was one of considerable silence, as I recall Mr. Colson's testimony.

There was some thought that perhaps, after Mr. Mitchell's return at the end of March 1972, from Key Biscayne, when he met with Mr. Haldeman first and then the two of them met with the President, that it may well be that they discussed electronic surveillance or similar activities at that discussion. As we know, the transcript discloses the subject matter was not discussed at all. It just seems to me quite clear that there would be no basis at all for anyone legitimately concluding the President had prior knowledge of this break-in. I don't pretend to sit here and tell you who I think did or who didn't. I think the resolution of that problem awaits another forum. I do know that there is a great deal of confusion regarding the matter. There is a great deal of conflicting testimony, as we have seen right here.

But the more fundamental problem, I think, that concerns the American people and thus concerns us, is whether or not the President was in any way involved in a criminal plot to obstruct justice after the break-in and up to March 21, 1973. I guess the principal piece of evidence that would be relied on to support any such finding would be Mr. Dean's testimony of his conference with the President on September 15. Now, as I said before, it is a great temptation to try Mr. Dean. But we don't have to do that. He has tried himself. He has already told us that within days after he returned from Hawaii, within days after the break-in, he, on his own, like Topsy, as he said, undertook to participate in the criminal conspiracy to obstruct justice.

He has pleaded guilty to it. Nothing would be served by my devoting extensive time to beat this gentleman any more. I would only observe this, and it struck me as being very significant about Mr. Dean. There was a very fine man here on the stand yesterday. This very fine man was lied to by Mr. Dean in a most dangerous manner. If this man hadn't had the advice or at least the insight at some point to get away from this, he could well have been indicted along with the rest of the people. Mr. Dean knew he was involved, on his own testimony, in a criminal plot. But he led this man to believe that it was all on the up

and up. And if we believe Mr. Ehrlichman's statements to this man sometime in July of the same year, he did the same thing to Mr. Ehrlichman.

However, on September 15, he testified before the Senate select committee that he was certain that the President was well aware of the cover-up. After being examined at some length by a number of Senators, he watered that down considerably to indicate, well, it was an inference that he drew. I suggest a fair reading of the text of that conversation as it relates to this subject matter makes it quite clear that the President was concerned with the political and the public relations aspects of this matter. It never occurred to him whatsoever that there was a criminal plot to obstruct justice. He was concerned about the politics, the newspaper coverage. He used the word "leaks." It is very clear that the President was concerned about these matters and not about any criminal obstruction of justice. So that to suggest, as Mr. Dean has in the past, that that proves the President knew of this plot simply is not supported by the facts.

And this is really underlined when Mr. Dean, on March 21—and he now admits it was March 21—came in to the President and said, in substance—and I can't quote it directly—it seems to me, Mr. President, there are some things I know that you don't know and that you had better know because you are going to have to make some decisions. And then he begins to tick off the things the President ought to know. One of those was a clear allegation of an obstruction of justice. Why is it that this man would come to the President and say, there is something I think you ought to know that you don't know, and still have the belief that he already knew it and had known it since September 15? Of course, that just doesn't wash.

Later on, during that same conversation, he said to the President in substance, I can tell, Mr. President, from your answers that these matters that I have talked with you about are new to you, you haven't any prior knowledge concerning them. And indeed, a fair reading of that conversation would indicate exactly that. The conversation was all over the lot. And we could spend 3 days sitting here arguing about phrases, words, sentences, paragraphs of that conversation. But one thing I would like to make clear is that the President in the course of that conversation did not authorize any payment to Mr. Hunt or his attorneys for any reason.

How can we say that? Let's see what the people did. We as lawyers quite often judge people by what was done or not done.

Did Mr. Dean go out and make arrangements for the payment? He did not. He indicated in his testimony here he felt under no obligation to do anything.

When he testified before the Senate select committee, he said nothing was resolved—unlimited in scope, although he tried to limit it here. He said nothing was resolved.

Mr. Haldeman made it quite clear that he had no instructions to do anything about it, and the evidence is clear he did nothing about it.

Who is it was supposed to do it, then, the President? Clearly not.

The President, in the course of that conversation, made it quite clear, as we all know, as any thinking man would know, you can't pay blackmail. There is no end to it. As he said, we lose, we get the short end of

both—we get the short side of both ends of the deal. And furthermore, it would look like a coverup, and that we cannot do. And he said that explicitly.

Now, there has been injected into these proceedings a grand jury indictment—materials sent over to this committee by the grand jury. And I would like to comment briefly, if I can, about that. Because if you read that indictment and particularly the overt acts concerning it—and I might identify overt acts 40 through 44—you get a picture that the grand jury obviously intended to be understood that there was a meeting between the President, Mr. Haldeman, and Mr. Dean on the morning of March 21; that following that, Mr. Haldeman made a phone call to Mr. Mitchell; that following that, Mr. Mitchell talked to Mr. LaRue; and following that, Mr. LaRue made a payment to Mr. Bittman. And if you may recall releases in the public press at that time, references were made to the grand jury indictment as being a roadmap for this committee and the American people to follow as far as Presidential participation was concerned. There is only one trouble with that roadmap. The roads don't exist.

What happened? This committee is the only body that does know what happened. This committee knows beyond any question that the machinery that was set in motion that resulted in this payment had nothing whatsoever to do with the President or any meeting with the President, and in fact, the payment would have been made whether or not Mr. Dean and Mr. Haldeman met with the President on March 21.

We know, for example, that Mr. Dean talked first with Mr. O'Brien and later with Mr. LaRue before he met with the President. Now, he didn't tell the President about his meeting with Mr. LaRue. He did lead the President to believe by what he told the President that there was no plan in the offing for making this payment. He said that he told O'Brien that he was out of the money business; he would have to go elsewhere; in fact, indicating to the President that there was no known plan to make this payment. In fact, however, before he met with the President, he had a talk with Mr. LaRue—Mr. LaRue testified that that was initiated by Mr. Dean—advising Mr. LaRue of the "problem" and suggesting that Mr. LaRue might talk with Mr. Mitchell, because Mr. LaRue said, I am not going to make any payment on my own. This all took place before Mr. Dean met with the President, on Mr. Dean's testimony, and I believe to the best of Mr. LaRue's memory he confirmed it.

Mr. Mitchell testified that LaRue called him before Haldeman called him and Haldeman called Mitchell about 12:30, about a half hour after the meeting with the President terminated. So this committee knows what really happened was that Mr. Dean set in motion the events that resulted in the payment of Mr. Hunt's attorney's fees. And he set those in motion without disclosing them to the President prior to meeting with the President.

And I submit he could have gone out and played tennis rather than meet with the President on the morning of March 21 and the same result would have happened. So that the roadmap does not in any way indicate Presidential participation. This seems to me to be clear beyond any serious question.

The meeting of the afternoon of the 21st, when read in its full context, clearly indicates again the President hasn't fully decided what's to be done. It is clear that he is unaware that the machinery has already been set in motion, the appointments made to deliver the money, the invitations issued, and so forth. He is unaware of that. And he is dealing with the matter as still a matter of judgment, looking forward to the substance of what might develop with respect to discussions with Mr. Mitchell and so forth, the next day. But it is clear in the course of his morning decision, his morning conversation, that he really made his decision then. And his decision was, we can't pay blackmail, and we all know that you can't pay blackmail. And his decision was that the solution is to put this matter to a grand jury.

He was understandably concerned about the political aspects of having the matter go before a Senate committee, and his solution was the matter ought to be resolved by grand jury action. And, indeed, it was ultimately.

However, he was faced with some information and he had to do something about it, and he did. Now, the question is, I think, whether or not the President in fact knew about the payment. It is clear he didn't order it or authorize it.

It seems to me also it is clear that the evidence that we have already indicates that he did not know even that the payment was authorized. But the President has authorized me to distribute to and disclose to this committee a portion of a transcript of a conversation he had with Mr. Haldeman on the morning of March 22, and I will be happy to distribute it at the close of my argument. This is a portion of a conversation that relates to this blackmail attempt. This says, in substance—and, of course, the entire tape is available to the chairman and the ranking member to be——

Mr. DANIELSON. Mr. Chairman, a point of order.

This committee has concluded the reception of evidence.

Mr. BUTLER. Regular order, Mr. Chairman.

Mr. COHEN. Regular order.

Mr. WIGGINS. No interruptions, Mr. Chairman.

The CHAIRMAN. Proceed, Mr. St. Clair.

Mr. ST. CLAIR. Keep in mind, now, this is the President on the morning of March 22 with Mr. Haldeman. And he says, among other things, "I don't mean to be blackmailed by Hunt. That goes too far."

Now, can a President say that on the morning of March 22 and still know of and having authorized earlier a payment that had been effected, according to the testimony, on the evening of March 21? And may have been effected even earlier than that? So that when it is suggested that the President knew all about this, that he condoned it, that he ordered it, it just is not factual.

Now, the next question, then, is raised, what about the President's duty to enforce the law? What did he do? He has a duty; he recognizes that. He had received allegations. These allegations had to be dealt with. They wouldn't go away, but they were allegations. So he asked Mr. Dean to go write up a report and he said, I think, if it opens doors, it opens doors, but I want that report.

Mr. Dean did not write that report, as we know. The President then asked Mr. Ehrlichman to make an investigation, as indeed Mr. Ehrlichman did.

Now, it may be suggested, well, the President should have fired everybody on the spot. Well, I don't see that a President should be faulted for not firing Mr. Haldeman immediately and not firing Mr. Ehrlichman immediately based on these allegations that the person who made them was either unable or unwilling to put in writing. But he did undertake an investigation and at the outset, he asked Mr. Ehrlichman to report to the Attorney General of this fact and asked that the Attorney General report directly to the President. I think this took place on March 27.

Now, on March 27—and this is 6 days afterward, 5 days of which they waited for Mr. Dean's report—the President, I believe, was in San Clemente. He ordered Mr. Ehrlichman, who at this time, at least, was not particularly implicated in the Watergate affair, to make an investigation. And we know from several sources that that investigation was being carried on. The President was anxious to clear this matter up, because for political reasons which are obvious to all of us, his administration and he personally were suffering because this matter remained unresolved. So the first thing he did was to insist that Mr. Dean go before the grand jury. This is quite consistent with his determination that was really made on March 21 that the solution lay in presenting evidence to a grand jury.

And may I digress for a moment? A considerable amount of discussion has taken place with respect to conversations with Mr. Mitchell relating to the relationships between the White House and the President and the Senate committee with respect to whether or not executive privilege should be claimed. The President, as we know, for many weeks had held to the view that he would insist on executive privilege. This view was adhered to, I guess, as late as the afternoon of March 22. It was recognized by the President that this would be interpreted as a coverup. But he felt quite strongly that as a President, he ought not to abdicate the responsibilities of his office and he took the view that executive privilege would be asserted in the Congress, in a Senate committee, not before the grand juries. However, Mr. Mitchell, and others, I guess—in particular Mr. Colson—prevailed on him to change this view and in due course, he did, so that by the time those hearings commenced—and I think he announced that in his statement of May 22, 1973—that by the time those hearings commenced, executive privilege with respect to the testimony of White House aides was waived, and I think even with respect to the attorney-client privilege that the President had with Mr. Dean.

So as this matter terminated, the President, as we know from the structure of his conversations, deals with a large number of aspects of a problem. But, eventually, the decision comes. It sometimes doesn't come in a flash of light. But eventually it comes and ultimately the decision was not to exert executive privilege because it would look like a coverup, and that he could not stand politically—I think we can all understand that.

Now, what else did he do? Well, he insisted that Mr. Dean go before a grand jury, I think on April 8. Mr. Dean, in substance—this message was relayed by Mr. Ehrlichman. In substance, Mr. Dean said he would, but he wanted to talk with Magruder first, obviously for the reason of visiting Mr. Magruder that he was not going to support Magruder's

testimony any longer. He felt in fairness to Magruder that he ought to tell him that. And I don't disagree. It was within days of that meeting that Mr. Magruder decided that he ought to, himself, go before the grand jury, or at least the U.S. attorney, and I think it was on April 14 that he went before the U.S. attorney and changed his testimony.

Throughout this period of time, the President directly, with John Dean and with messages delivered to Mr. Mitchell and Mr. Magruder, indicated his strong desire that they testify, that they tell the truth, that if they have perjured themselves, they purge themselves of that perjury and tell the facts as they have.

Now, when it was learned that Mr. Magruder was going to change his testimony, presumably as a result of Mr. Dean's willingness to go before the grand jury, the same facts became known, of course, to Mr. Kleindienst. Mr. Ehrlichman had talked with Mr. Kleindienst on the 14th, and on the 15th, Mr. Kleindienst met with the President in the afternoon on Sunday, and discussed the matter at length. Portions of that we have. He then suggested that he would have to recuse himself, and he did so. Mr. Henry Petersen was brought in to head up the investigation.

Now, Mr. Petersen has been described as a good soldier. I suggest Mr. Petersen has been a good soldier through many administrations. I found nothing about his conduct that indicated in any way that he would participate in anything that he felt was improper. In fact, he told the President at one point, if I thought you were trying to cover up for anybody, I would get up and walk out. And I think Mr. Petersen would. I have not the slightest doubt about that.

To suggest, though, that Mr. Petersen did something other than what was appropriate seems to me to not be supported in the evidence. He was anxious that the President fire everybody immediately—not so much because he thought they were necessarily guilty, but because he thought it would be bad for the administration to have these people around. There was only one problem: he agreed with the President that Haldeman, Ehrlichman, and Dean ought to be treated alike. To single one out or two out would, in his judgment, be, A, unfair—the President thought it would be unfair—and B, might in fact impair their rights by suggesting that those who were retained were innocent and those who were fired were guilty. Essentially, Petersen agreed.

Petersen asked, however, that the President not take this step because the U.S. attorney's office was engaged in negotiations with Mr. Dean for immunity and it may well turn out they would have to have Mr. Dean's testimony if they were going to be able to indict Mr. Haldeman and/or Mr. Ehrlichman.

So they could not, in the proper prosecution of this matter, give up any chance of obtaining that testimony of Mr. Dean, even if ultimately, it meant they had to grant him immunity. And they wanted time to do this. And Mr. Petersen asked the President, in effect, to hold up and wait until they had a chance to conclude these discussions. And it is exactly what happened.

The President received the written resignations of all three of them on or about the 15th or 16th. But he held those. He held those because Mr. Petersen asked him not to do anything until he had a chance to complete the negotiations with Mr. Dean and his attorneys.

Now, there has been considerable question raised with respect to whether or not the President improperly disclosed information obtained from Mr. Petersen to his aides, particularly, I guess, Mr. Ehrlichman. And I would like to deal with that specifically for the moment if I may.

First of all, Mr. Petersen indicated that he did not at any time, first give any grand jury testimony to the President. More importantly, he said he never identified any of the information that he did give to the President as grand jury information.

And third, the President clearly recognized a duty with respect to grand jury information, but not all information. If I may make a specific reference to page 966 of the Presidential submission of April 30 to which reference was made during the course of the presentation. The President says to Mr. Petersen:

I just want to know if there are any developments I should know about, and second, of course, as you know, anything you tell me, as I think I told you earlier, will not be passed on.

Mr. Petersen says: "I understand, Mr. President."

Then the President says: "Because I know the rules of the grand jury."

Now, clearly what the President is saying in that conversation is, I know the rules of the grand jury and I won't pass on grand jury materials. And in fact, he never did pass on grand jury materials. He didn't have any to begin with and any information he did have was never identified to him as grand jury materials.

Now, one of the items that it was suggested that he passed on is made reference to on page, I think, 983.

The CHAIRMAN. Excuse me, Mr. St. Clair. Would you identify just what——

Mr. ST. CLAIR. This is page 983, Mr. Chairman, of the President's submission of April 30, 1974. It is a conversation between the President and Mr. Haldeman on April 17, 1973.

The CHAIRMAN. That is the edited transcript?

Mr. ST. CLAIR. That is correct.

Ms. HOLTZMAN. Mr. Chairman.

The CHAIRMAN. We will proceed.

Mr. ST. CLAIR. If I may, on page 983, reference was made that this information was information that was passed on to the President. The President says—well, I should read a bit ahead to get the context. The President says, "Look, you have got to call Kalmbach, so I want to be sure. I want to try to find out what the hell he is going to say. He told Kalmbach. What did Kalmbach say he told him? Did he say they wanted this money for support or——"

And Petersen—No, Haldeman says, "I don't know. John has been talking to Kalmbach."

Then the President says, "Well, be sure that Kalmbach is at least aware of this, that LaRue has talked very frequently. He is a broken man."

Now, I asked Mr. Petersen if that constituted grand jury testimony or information. He said it did not, as it clearly does not. It is certainly something that I think a person like Kalmbach really ought to be aware of, and in fact, had already been informed of the fact, as I

remember Mr. Kalmbach's testimony, by Mr. O'Brien. I am sure the President must have felt that he didn't want Kalmbach in some misguided effort to protect the Presidency and the administration to testify to matters that weren't fact, believing that Mr. LaRue had not testified with respect to those same matters. So that the disclosure to Kalmbach that LaRue had talked freely is hardly grand jury information, and is secondly a disclosure designed only to produce truth.

So when Mr. Petersen said in substance that there was no grand jury material passed to the President, and in fact, the information that was passed to the President was appropriate for the President, to disclose to his aides in the course of determining what administratively should be done for them, or to them, it would seem to me quite clear that there is no warrant in the record to suggest that the President was anything other than acting properly in this regard.

Ultimately, and we are drawing to the close, Mr. President—Mr. Chairman. That is a slip.

Ultimately, of course, the immunity negotiations with Mr. Dean broke down. The prosecution no longer needed his testimony. The President, before that had happened, however, we should remember, said in substance to Mr. Petersen, if you need Dean's testimony to get Haldeman or Ehrlichman, go ahead and grant him immunity. But I am not going to be blackballed in this matter. Ultimately, as I say, the prosecutors determined that they did not need Dean's testimony by the immunity route. The negotiations were broken off. Ultimately Dean entered a voluntary plea of guilty and his testimony became available in that manner. And the President accepted the resignation of all three of them.

Now, as I said earlier, sometimes the best way to deal with these matters, with an inference, inferences are properly to be drawn and the like are to see and to look at what happened. What is the result, ultimately what was the situation? Ultimately in the case of all major presidential aides testified freely without executive privilege assertions before the Senate select committee. So, if there was a contemplated cover up there, it never came to pass.

Furthermore, they were all released of any obligations by way of executive privilege or attorney-client privilege to testify before the grand jury. They were, in fact, urged to do so by the President. In fact, I think he at one time announced sanctions would be imposed if anyone didn't testify before a grand jury.

The President urged Mr. Dean to tell the truth. He urged Mr. Magruder to purge himself of perjury. He told Mr. Mitchell the President was preparing to let the chips fall where they may, that Mr. Mitchell should not keep quiet on his account. And ultimately all of these gentlemen were indicted by a grand jury and are now prepared to stand trial on these issues, so that if you want to judge the pudding by the eating, the process has worked. Maybe it should have worked days earlier. I don't know. I don't pretend perfection on my part or even on the part of the President.

I find it hard to be critical of a President who would stand by his what he thought were faithful aides until such time as there was evidence developed that they should be released. I am sure that if every time our associates were charged with wrongdoing we fired them, we would never have anybody work for us.

But, when it is all said and done, the preservation of justice, of administration of criminal justice has been preserved and is functioning; as late as last week, it functioned, and will function in all of these cases.

So, can it be said that what the President did or did not do perverted the administration of criminal justice, prevented it from functioning, distorted the end results that can be expected by the proper functioning of this system that has been developed in our jurisprudence over the last couple of hundred years?

Ladies and gentlemen, the proof of that pudding is in its eating. Mr. Haldeman, Mr. Ehrlichman and others, Mr. Mitchell will stand trial. If they are innocent they will be set free. If they are guilty they will be found guilty. It is not necessary for us to judge them.

It seems to me that the situation is confusion in many respects. If it is confusing for us now after many, many months of investigations not only by your very excellent staff, but by the staff of the Senate select committee, by the Office of the Special Prosecutor and otherwise, consider how confusing it must have appeared to the President, when faced with this alarming charge, consider yourself under the circumstances. What would you have done that was substantially different? If there was a delay in terms of days, was there any real prejudice developed for the people of the United States by reason of that delay? Did not the President use judgment in wanting to know a little more about the evidentiary support for these charges before acting on them? Clearly I submit that this unfortunate, distasteful event will be brought to its just conclusion, not solely by reason of the President's conduct but by means, but certainly by reason of his cooperation and his contribution to the end result, in conjunction with the Department of Justice, and these gentlemen will be prosecuted, and the right determination I am sure will result.

But nothing in this sordid story would constitute, in my view, a warrant for the inference that the President deliberately plotted to obstruct justice, that he ordered the money paid, or authorized the others to pay it to Hunt. That just is not the fact. And the evidence, in my view, clearly shows it isn't the fact.

Mr. Chairman, I think I have talked for about an hour and a half. It has been my view that arguments such as I have made do not retain effectiveness, if they have any effectiveness at all, much beyond this period of time. I would like to say in closing that I appreciate the courtesies that the chairman has accorded me, and that the members of this committee have accorded me. I am certain that you will realize and will acquit yourself in your very awesome responsibilities with responsibility. It may be that I will not have the opportunity to address you again, and after 10 weeks I feel that we have had a relationship which I personally feel has been cordial.

I will only say this, as I said at the beginning, that the American people, in my view, and you will have to be the judges of this, not me, because when I will be finished I can get up and walk out that door, but the American people are going to want to be satisfied that a President of the United States is not going to be impeached on anything less than clear evidence or justification. And I submit that does not exist in this case.

Mr. Chairman, therefore, may I be excused?

The CHAIRMAN. Mr. St. Clair, before you are, you made reference in your response to a portion of a transcript of a recorded conversation which presumably took place on March 22.

Mr. ST. CLAIR. That's correct, sir, and I have copies for everybody here.

The CHAIRMAN. At what time did that conversation take place?

Mr. ST. CLAIR. 9:11, sir, to 10:35 a.m.

The CHAIRMAN. Mr. St. Clair, are you aware that in presenting that to this committee for the first time as a transcript, that that matter was subpenaed by this committee, that conversation from 9:11 to 10:35 a.m., and that there was a refusal on the part of the President to turn over that particular conversation?

Mr. ST. CLAIR. Mr. Chairman, I am. But the President has authorized me to make this disclosure at this time. I don't know, Mr. Chairman. Am I to be excused or should I stay?

The CHAIRMAN. Are we going to receive the recorded conversation, Mr. St. Clair?

Mr. ST. CLAIR. Mr. Chairman——

The CHAIRMAN. My understanding was that we had requested this matter and subpenaed a recorded conversation, and for one reason or another, my impression is that the President stated that that conversation, along with other conversations that were refused to us, were not pertinent or relevant to the inquiry. And all of a sudden this morning you make reference to this conversation.

Mr. ST. CLAIR. Well, Mr. Chairman, Mr. Dean testified, as I remember, that the President in effect authorized the payment, and that's the first time that testimony had ever come out. Mr. Dean had previously testified that nothing had been resolved.

Mr. SARBANES. Mr. Chairman, could we inquire of the conversation that took place for 1 hour and 24 minutes on the morning of March 22, how many pages of an edited transcript Mr. St. Clair proposes to submit to the committee this morning in the course of making this final presentation? In other words——

Mr. ST. CLAIR. Two and one-half pages, Mr. Sarbanes.

Mr. SARBANES. Two and one-half pages?

Mr. ST. CLAIR. Yes, sir.

Mr. SARBANES. Of this 1-hour-and-24-minute conversation?

Mr. ST. CLAIR. That is correct. This portion of it relates to the alleged blackmail.

Mr. RAILSBACK. Mr. Chairman?

The CHAIRMAN. Mr. Railsback.

Mr. RAILSBACK. Mr. St. Clair, I am very interested in seeing that conversation, and, frankly, some others as well. I am wondering why it wouldn't be better if we are to be asked to accept and give credence to or value to a conversation that took place at a very relevant time, if you wouldn't make available the whole 1 hour and 35 minutes or whatever the timespan? Wouldn't that be, wouldn't that be much better so that we could see everything in context?

Mr. ST. CLAIR. Well, Mr. Railsback, first of all, of course, I don't make these decisions. There is only one person that can make them. It's the President's view that this portion relates to the blackmail

allegation made by Mr. Dean, and his attitude with respect to those. I will, of course, convey to him your suggestion that the transcript, the entire transcript be made available. But, I would also say to you that the transcript is, the tape itself is available to the chairman and the ranking minority member to verify if they so desire.

Mr. RAILSBACK. Is that the entire tape?

Mr. ST. CLAIR. Yes. The same rules that were applied in the President's April 30 submission would be applicable, of course.

Mr. RAILSBACK. May I just suggest this to you——

The CHAIRMAN. Would the gentleman yield for a moment? The gentleman is aware that we are talking about a conversation that this committee subpenaed on April 30?

Mr. RAILSBACK. I understand. I understand, right. If I could just pursue this, Mr. St. Clair, I thought you made a very forceful, articulate, fair presentation this morning. As one member, I would feel really delinquent if I don't pass to you some concerns that I have inasmuch as you are going to be leaving this room and this committee. And we do have a very important responsibility.

It is obvious I think to you, it must be obvious to you, as you sat here and heard the evidence that we heard, including the testimony of live witnesses, for instance, John Dean's testimony concerning the conversation that he had on September 15, which included a discussion about the IRS, now it's clear to me, more clear than it has ever been before that that 17-minute segment, 13 minutes of which Judge Sirica has indicated now that he believes to be relevant to the Special Prosecutor's investigation, that that's very, very relevant to our inquiry. And as one member, that frankly still wants to give the President the benefit of the doubt, it must appear to you that some of these conversations that we have subpenaed are extremely relevant, and as indicated by the evidence, and I just wonder if you can't pass that on to the President.

And I know you can't make that decision. But I think, I think it's going to make, could make a difference in the minds of some people.

Ms. HOLTZMAN. Mr. Chairman?

Mr. ST. CLAIR. Well, Mr. Railsback, of course I will pass on your views to the President.

Ms. HOLTZMAN. Mr. Chairman?

The CHAIRMAN. Ms. Holtzman.

Ms. HOLTZMAN. Thank you very much, Mr. Chairman.

Mr. Chairman, I refrained from making a point of order out of courtesy to Mr. St. Clair, since I felt he ought to present his argument as a consistent and coherent whole.

Mr. ST. CLAIR. Thank you.

Ms. HOLTZMAN. But I do think I would like to register a point of order against all statements in the summation that he made or a response that he made in which he said there is no evidence to support or there is no evidence in the record, because that does not take into account the fact that we have subpenaed innumerable tape recordings, and we do not know what is contained therein. And therefore, I think the statement that there is no evidence is unsupported on the state of this record.

Mr. DENNIS. Mr. Chairman?

The CHAIRMAN. Mr. Dennis.

Mr. DENNIS. Mr. Chairman, on the point of order or whatever we are on, I would like to say this. We have problems here as we——

The CHAIRMAN. The lady has merely registered a point of order.

Mr. DENNIS. On the point we are discussing then we have problems we are faced with here as we all know. I would like to get as much information as possible. I share somewhat Mr. Railsback's concerns. The record will show that I have voted for most subpenas, and I have certainly worked as hard as anybody, even harder than any other member to call as many live witnesses as we can. That has been my policy right along.

Now, I think we would be making a very bad mistake not to take whatever evidence we can have.

The CHAIRMAN. I agree.

Mr. DENNIS. And we can weigh its weight, and I hope the chairman and the ranking member will go down and hear the rest of it as far as I am concerned. But, we certainly should have it. Thank you, Mr. Chairman.

Mr. WIGGINS. Mr. Chairman?

The CHAIRMAN. Mr. Wiggins.

Mr. WIGGINS. My parliamentary inquiry I would have made prior to the gentleman's argument, but the Chair was not inclined to receive comments at that time, and I hope you understand——

The CHAIRMAN. Well, I didn't want to interrupt Mr. St. Clair.

Mr. WIGGINS. Well, I understand. But, I do wish to inquire of the Chair whether or not the record is open for the recipt of additional evidentiary materials that may develop between now and the time that Congress must adjudicate the issue. I raise that because we have the possibility of further information coming as a result of the Supreme Court opinion, and we certainly ought to receive whatever information of that nature we can get.

The CHAIRMAN. Of course. Absolutely.

Mr. WIGGINS. I understand then the Chair's ruling to be that the record is not closed?

The CHAIRMAN. That is correct.

Mr. SARBANES. Mr. Chairman?

Mr. MEZVINSKY. Mr. Chairman?

The CHAIRMAN. Mr. Sarbanes.

Mr. SARBANES. No. I withdraw my question.

The CHAIRMAN. May I state before going any further that the Chair is prepared to accept the matter that Mr. St. Clair has referred to. However, making the Chair's comments, and making them very strongly that the Chair accepts them with that reservation that the committee will have to be aware of the fact that on May 30 there was a subpena issued for a conversation between the President and Mr. Haldeman which specified that this conversation took place on March 22, between 9:11 and 10:35 a.m., and for a period thereafter there was constant refusal on the part of the President to honor this subpena with, as I recall his letter, the statement to the effect that none of those conversations related in any way to the inquiry, that the matter of Watergate had been completed, and that the committee had all of the information before it that it needed. And with that, Mr. St. Clair, I accept the transcript, and I want to thank you very much for having——

Mr. HOGAN. Mr. Chairman?

The CHAIRMAN [continuing]. Having been as courteous as you have been. And we appreciate that fact that you have had a very, very difficult time, and we excuse you.

Mr. ST. CLAIR. Thank you very much, sir.

Mr. HOGAN. Mr. Chairman? Mr. Chairman, it relates——

The CHAIRMAN. Before he's excused?

Mr. HOGAN. If I may, Mr. Chairman.

The CHAIRMAN. Sure.

Mr. HOGAN. I recall some time ago Mr. St. Clair was about to present to us some material that——

The CHAIRMAN. He has.

Mr. HOGAN. He has it available, the green book?

Mr. ST. CLAIR. Yes, Sir. The briefs will be concluded, including last night's testimony, and should be filed by Friday of this week.

Mr. HOGAN. Thank you, Mr. Chairman.

The CHAIRMAN. I hope. By Friday of this week?

Mr. ST. CLAIR. By Friday of this week.

The CHAIRMAN. Fine, as we would want to include them.

Mr. ST. CLAIR. I am going to go back and read. Thank you.

The CHAIRMAN. Thank you very much, Mr. St. Clair. Thank you.

[The "Brief on Behalf of the President of the United States" and "Analysis of the Scope of an Article of Impeachment" presented to the Committee on the Judiciary by Mr. St. Clair follow:]

BRIEF ON BEHALF OF THE PRESIDENT OF THE UNITED STATES

38-634 O - 74 - 3

INTRODUCTION

This brief is submitted in response to the areas of inquiry reviewed in depth by the Committee on the Judiciary. The brief neither reflects our belief as to the significance of the areas highlighted nor concedes the relevancy of any areas not addressed. It is offered to provide the Committee on the Judiciary with the most complete record possible under the available time frame. Should the committee desire any additional submissions, the Special Counsel to the President would welcome the opportunity to respond to any particular request.

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I. WATERGATE

A. No Evidence Has Been Presented To Show the President Had Prior Knowledge of the Plans To Burglarize the Democratic National Committee

On May 22, 1973, the President in a national radio and television address said:

> The burglary and bugging of the Democratic National Committee headquarters came as a complete surprise to me. I had no inkling that any such illegal activities had been planned by persons associated with my campaign . . . (9 Weekly Compilation of Presidential Documents 696, May 22, 1973, Presidential Presentation, book I, tab 15a, p. 133).[1]

The special staff of the House Committee on the Judiciary has not produced a single shred of evidence showing that the President's statement is untrue. In fact, all of the evidence corroborates the President's statement.

In his March 21, 1973, meeting with the President, John Dean told the President there was no White House involvement in the planning of the burglary:

> D. Uh, I honestly believe that no one over here (at the White House) knew that (there were plans to break-in the DNC). (Judiciary Transcript, Mar. 21, 1973, a.m., p. 87).[2]

After Dean had for the first time told the President some of the details of the Watergate burglary and the coverup thereof, Dean again told the President that this was new information of which the President was unaware:

> D. . . . you're not involved in it . . .
> P. That is true.
> D. I know, sir, it is. Well I can just tell from our conversations that, you know, these are things that you have no knowledge of. (Judiciary Transcript, Mar. 21, 1973, a.m., p. 100).

Both Haldeman and Ehrlichman testified before the Senate select committee that they did not believe the President had prior knowledge of the break-in plans. (Haldeman 7 SSC 2883, Ehrlichman 6 SSC 2769, Presidential Presentation, book I, tabs 5a–5b, pp. 54–55).[3]

In a conversation with the President on March 21, 1973, Ehrlichman further elaborated that the White House had no advance knowledge of the break-in:

> E. The, the only thing that we can say is for Ziegler to say, "Look, we've investigated backwards and forwards in the White House, and we're satisfied on the basis of the report we have that nobody in the White House has been involved

[1] Presdential Presentation refers to the "Statement of Information Submitted on Behalf of the President," hearings before the Committee on the Judiciary of the House of Representatives, May–June 1974.

[2] The citations to Judiciary Transcripts, included in this brief are from "Transcripts of Eight Recorded Presidential Conversations," hearings before the Committee on the Judiciary, House of Representatives, pursuant to H. Res. 803, serial No. 34, May–June 1974.

[3] Citations to SSC refer to the printed transcripts of the hearings before the Senate Select Committee on Presidential Campaign Activities.

in a burglary; nobody had notice of it, knowledge of it, participated in the planning, or aided or abetted it in any way."

P. Well, that's what you could say.

E. And it happens to be true. (Judiciary Transcript, Mar. 21, 1973, p.m., p. 145.)

Mitchell is the only close adviser alleged to have advance knowledge of the burglary, but Mitchell stated he never discussed this subject with the President. (Mitchell 4 SSC 1628, Presidential Presentation, book I, tab 6a, p. 58.) Mitchell believed the President did not know of either the burglary plans or the coverup because, as Mitchell said:

I know the . . . [President] . . . , I know his reactions to things, and I have a very strong feeling that during the period of time in which I was in association with him and did talk to him . . . , I just do not believe that he had that information or had that knowledge; otherwise, I think the type of conversations we had would have brought it out. (Mitchell 4 SSC 1628, Presidential Presentation, book I, tab 6a, p. 58.)

Finally, Richard Moore, a close association of the President confirmed the fact that the President had no prior knowledge. Moore testified before the Senate select committee:

As I sat through the meeting of March 20 with the President and Mr. Dean in the Oval Office, I came to the conclusion in my own mind that the President could not be aware of the things that Dean was worried about or had been hinting at to me. . . . It seemed crystal clear to me that he knew of nothing that was inconsistent with the previously stated conclusion that the White House was uninvolved in the Watergate affair, before or after the event. (Moore 5 SSC 1944, 1945, see also 2067, Presidential Presentation, book I, tab 6b, p. 59.)

The special staff has failed to produce any evidence to demonstrate that the President had foreknowledge of the burglary plans.

The evidence clearly establishes that after the second meeting in Mitchell's office on February 4, 1972, the modified Liddy plan ($250,000) was turned down and Dean concluded that the plan was at an end. (Dean 3 SSC 931, Presidential Presentation, book I, tab 7a, p. 64.) Dean later met with Haldeman and described the meetings in which the Liddy plans were considered. Dean advised Haldeman that the White House should have nothing to do with any such activity. Haldeman agreed. (Dean 3 SSC 930, Presidential Presentation, book I, tab 7b, p. 65.)

Subsequently, Magruder reported by telephone to Strachan that a "sophisticated political intelligence gathering system" had been approved, as one of approximately 30 items under consideration. Magruder did not elaborate and Strachen dutifully repeated this information, practically verbatim, in a three line paragraph in his Political Matters Memo No. 18 directed to Haldeman. Attached to this memo under tab H were reports identified by the code name "Sedan Chair" as examples of the type of information being developed. These reports did not disclose the character of the source of the information. (Stratchan 6 SSC 2441, 2452, Presidential Presentation, book I, tab 8a, p. 68.)

There is no reason to believe that Haldeman knew the "intelligence gathering" system referred to in Strachan's memo was, in fact, illegal. Magruder testified that the original concept of intelligence gathering was "simply one of gathering . . . information through sources in the opposition's committee." (Magruder 2 SSC 810, Presidential Presentation, book I, tab 8b, p. 70.) Sedan Chair was such an activity.

Magruder and Reisner testified that Sedan Chair involved a disgruntled campaign worker from the Humphrey Pennsylvania organization who passed information to CRP. (Magruder 2 SSC 848, Presidential Presentation, book I, tab 8b, p. 70.) (Reisner 2 SSC 499, 500, Presidential Presentation, book I, tab 8c, p. 72.) Ehrlichman and Porter described a similar operation using a Muskie campaign courier to photograph documents he was delivering. Porter deemed this activity surreptitious but not illegal. (Ehrlichman 7 SSC 2768.) (Porter 2 SSC 670–671, Presidential Presentation, book I, tab 8d, p. 74.)

Dean in discussing this matter with the President on the morning of March 21, 1973, stated that: ". . . Bob (Haldeman) was assuming, that they (CRP) had something *that was proper* over there, some intelligence gathering operation that Liddy was operating." (Emphasis added.) (Judiciary Transcript, Mar. 21, 1973, a.m., p. 84.) In referring to a Sedan Chair-type operation, Dean told the President that there is "nothing illegal about that." (Judiciary Transcript, Mar. 21, 1973, a.m., p. 85.)

The instruction from Haldeman to Strachan to transfer the intelligence "capabilities" from Muskie to McGovern, does not establish that Haldeman knew the activities were illegal. The evidence presented by the special staff only shows that Haldeman may have known of the lawful intelligence gathering activities. (Strachan 6 SSC 2476.) Strachan suspected that it involved such things as the Muskie driver. (Strachan 6 SSC 2470.)

There is no evidence to show that Haldeman ever discussed intelligence gathering with the President. The Senate select committee testimony discloses that the Political Matters Memo No. 18 was prepared by Strachan on March 31, 1972, and submitted to Haldeman. It was returned to Strachan with a check mark opposite the paragraph relating to intelligence gathering. According to Strachan, this mark indicated that Haldeman had seen the matter. (Strachan 6 SSC 2452, Presidential Presentation, book I, tab 10a, p. 82.) Four days later Strachan prepared a talking paper to Haldeman to use in a meeting that he was having that day with Mitchell—*not with the President.* (Strachan 6 SSC 2452, Presidential Presentation, book I, tab 10a, p. 82.) After Haldeman met with Mitchell, the talking paper was returned and filed with Memo No. 18. According to Strachan, the subject of intelligence gathering was never raised again by Haldeman, and Strachan only assumed Haldeman discussed it with Mitchell. (Strachan 6 SSC 2454, Presidential Presentation, book I, tab 10a, p. 82.) Strachan never testified that Haldeman discussed intelligence gathering with the President. In fact, Strachan testified that any memo discussed with the President bore the letter "P" in the upper right hand corner with a check mark through the "P." Strachan is quite certain that none of his political matters memos had this marking. (Strachan 6 SSC 2488, Presidential Presentation, book I, tab 10a, p. 82.)

Haldeman testified that Strachan did not know what transpired at the April 4, 1972, meeting and that Strachan's suggestion that intelligence gathering was discussed is "farfetched." Haldeman indicated that he and Mitchell did not discuss intelligence gathering activities with the President, but only reviewed matters relating to the ITT-

Kleindienst hearings and assignments of regional campaign responsibilities.

The notes Haldeman took during this meeting show that no other matters were discussed. (Haldeman 7 SSC 2881, Presidential Presentation, book I, tab 11a, p. 86.) The transcript of the April 4, 1972, meeting of the President with Haldeman and Mitchell fully confirms Haldeman's testimony that no reference was made to any intelligence gathering system. (Presidential Presentation, book I, tab 11b, p. 87.) Mitchell confirmed this in his recent testimony before the House Judiciary Committee. (Mitchell HJC 3372.)[4]

If there remains any doubt that the President had no advance knowledge of the Watergate burglary, his recorded and spontaneous statements of shock and surprise upon first learning of the break-in would seem conclusive. On February 28, 1973, at a meeting with Dean, the President reacted to the burglary saying:

P. Good G__ almighty. I mean, of course, I'm not dumb, and I will never forget when I heard about this G__ damned thing (unintelligible) J____ C_____, what in the hell is this? What's the matter with these people? Are they crazy? I thought they were nuts. (Judiciary Transcript, Feb. 28, 1973, a.m., p. 45.)

The President first learned of potential White House involvement in the planning and execution of the break-in on March 13, 1973, when Dean told him Strachan knew about the break-in plans in advance. The President expressed his surprise at this revelation and to make sure he heard correctly, asked again and again.

P. Did Strachan?
D. Yes.
P. He knew?
D. Yes.
P. About the Watergate?
D. Yes.
* * * [continued later]
P. But he knew? He knew about Watergate? Strachan did?
D. Uh huh.
P. I'll be damned. . . . (Judiciary Transcript, Mar. 13, 1973, p.m., p. 71.)

On March 13, the President again characterized the break-in saying, "What a stupid thing. Pointless." (Judiciary Transcript, Mar. 13, 1973, p.m., p. 72.)

On March 21, 1973, when the President finally learned substantially all of the details of the White House involvement from Dean, the President said:

P. Why (unintelligible) I wonder? I am just trying to think as to why then. We'd just finished the Moscow trip. I mean, we were—
D. That's right.
P. The Democrats had just nominated McG—, McGovern, I mean, for C_____ sakes, I mean, what the hell were we—I mean I can see doing it earlier but I mean, now let me say. I can see the pressure but I don't see why all the pressure would have been around then. (Judiciary Transcript, Mar. 21, 1973, a.m., p. 86.)

Finally in the conversation of the President, Haldeman, and Ehrlichman on March 27, 1973, the following exchange again demonstrates the President's lack of knowledge:

H. O'Brien raised the question whether Dean actually had no knowledge of what was going on in the intelligence area between the time of the meetings in

[4] Citations to HJC are taken from the Report of Proceedings of the Committee on the Judiciary during its Impeachment Inquiry.

Mitchell's office, when he said don't do anything, and the time of the Watergate discovery. And I put that very question to Dean, and he said, "Absolutely nothing."

P. I would—the reason I would totally agree—that I would believe Dean there (unintelligible) he would be lying to us about that. But I would believe for another reason—that he thought it was a stupid damn idea.

E. There just isn't a scintilla of hint that Dean knew about this. Dean was pretty good all through that period of time in sharing things, and he was tracking with a number of us on—

P. Well, you know the thing the reason that (unintelligible) thought—and this incidentally covers Colson—and I don't know whether—. I know that most everybody except Bob, and perhaps you, think Colson knew all about it. But I was talking to Colson, remember exclusively about—and maybe that was the point—exclusively about issues . . .

* * * * * * *

P. Right. That was what it is. But in all those talks he had plenty of opportunity. He was always coming to me with ideas, but Colson in that entire period, John, didn't mention it. I think he would have said. "Look we've gotten some information," but he never said they were. Haldeman, in this whole period, Haldeman I am sure—Bob and you, he talked to both of you about the campaign. Never a word. I mean maybe all of you knew but didn't tell me, but I can't believe that Colson—well—(White House Transcript, Mar. 27, 1973, 11 a.m.–1:30 p.m., pp. 328–330).[5]

Thus, a full and fair analysis of all the available evidence conclusively demonstrates that the President had absolutely no prior knowledge of the Liddy plans.

[5] The White House Transcripts are taken from the Submission of Recorded Presidential Conversations to the Committee on the Judiciary of the House of Representatives by President Richard Nixon, dated Apr. 30, 1974.

B. There Is No Evidence That the President Had Knowledge Prior to March 21, 1973, of an Alleged Plot To Obstruct Justice With Respect to the Break-In at the Democratic National Committee

An objective analysis of the evidence before this committee will reaffirm the fact that the President had no prior knowledge of an alleged plot to obstruct justice by such means as the attempted use of the CIA to thwart the FBI's Watergate investigation, the destruction of evidence, the subornation of perjury, and the payment of "hush money."

The allegation that John Dean informed the President of an illegal coverup on September 15, 1972, is based exclusively on the testimony of Dean. In his testimony before the Senate select committee Dean stated that he was certain after the September 15 meeting that the President was fully aware of the coverup. (Dean 4 SSC 1435, Presidential Presentation, book I, tab 3a, p. 46.) However, in answering questions of Senator Baker, he modified this by stating it "is an inference of mine." (Dean 4 SSC 1475, Presidential Presentation, book I, tab 3a, p. 47.) Later he admitted he had no personal knowledge that the President knew on September 15 about a coverup of Watergate. (Dean 4 SSC 1482, Presidential Presentation, book I, tab 3a, p. 48.)

The tape of the conversation between the President and Dean on September 15, 1972, does not in any way support Dean's testimony that the President was "fully aware of the coverup." The tape of September 15, 1972, does indeed contain a passage in which the President does congratulate Dean for doing a good job:

> P. Well, the whole thing is a can of worms. As you know, a lot of this stuff went on. And, uh, and, uh, and the people who worked (unintelligible) awfully embarrassing. And, uh, and, the, uh, but the, but the way you, you've handled it, it seems to me, has been very skillful, because you—putting your fingers in the dikes every time that leaks have sprung here and sprung there. . . . (Judiciary Transcripts, Sept. 15, 1972, p.m., p. 7.)

This was said in the context not of a criminal plot to obstruct justice as Dean alleges, but rather in the context of the politics of the matter, such as civil suits, countersuits, Democratic efforts to exploit Watergate as a political issue and the like. The reference to "putting your finger in the leaks" was clearly related to the handling of the political and public relations aspect of the matter. At no point was the word "contained" used as Dean insisted had been the case in his testimony. (Dean 4 SSC 1476–1477.)

This is an example of what the President meant when he said that the tapes contain ambiguities that someone with a motive to discredit the President could take out of context and distort to suit his own purposes.

If Dean did in fact believe that the President was aware of efforts illegally to conceal the break-in prior to March 21, 1973, it is strange

that Dean on that date felt compelled to disclose to the President for the first time what he later testified the President already knew. After some preliminary remarks concerning the Gray confirmation hearings, Dean stated the real purpose for the meeting:

D. Uh, the reason, I thought we ought to talk this morning is because in, in our conversations, uh, uh, I have, *I have the impression that you don't know everything I know.*
P. That's right.
D. and it makes it very difficult for you to make judgments that, uh, that only you can make
P. That's right.
D. on some of these things and I thought that—(Emphasis added.) (Judiciary Transcript, Mar. 21, 1973, a.m., p. 80.)

He then proceeded to detail for the President what he believed the President should be made aware of, first in the "overall."

Dean stated, "We have a cancer-within-close to the Presidency, that's growing," and "people are going to start perjuring themselves. . . ." (Judiciary Transcript, Mar. 21, 1973, a.m., p. 81.) He described the genesis of the DNC break-in; the employment of Liddy; the formulation of a series of plans by Liddy which Dean disavowed, as did Mr. Haldeman; the belief that the CRP had a lawful intelligence gathering operation and the receipt of information from this source; and the arrest at the DNC on June 17, 1972. He then informed the President of a call to Liddy shortly thereafter inquiring ". . . whether anybody in the White House was involved in this" and the response "No, they weren't." (Judiciary Transcript, Mar. 21, 1973, a.m., p. 86.)

Dean next laid out for the President what happened after June 17. He informed the President "I was under pretty clear instructions (laughs) not to really investigate this . . . I worked on a theory of containment—to try to hold it right where it was," and he admitted that he was "totally aware" of what the FBI and grand jury were doing. (Judiciary Transcript, Mar. 21, 1973, a.m., p. 80.) Throughout these disclosures the President asked Dean a number of questions such as:

P. Tell me this: did Mitchell go along? (White House Transcript, Mar. 21, 1973, a.m., p. 175.)[6]

* * * * * * *

P. That could be—Colson know [sic] what they were talking about?

* * * * * * *

P. Did Colson—had he talked to anybody here?
D. No. I think this was an independent—
P. Did he talk to Haldeman?

* * * * * * *

D. . . . Strachan. Some of it was given to Haldeman. uh, there is no doubt about it. Uh—
P. Did he know what it was coming from? (Judiciary Transcript, Mar. 21, 1973, a.m., pp. 84–85.)

Altogether, the President asked Dean more than 150 questions in the course of this meeting.

Dean then described to the President the commencement of what he alleges was a cover-up involving himself and others. Implicit in these revelations, of course, is that the President was not involved but

[6] The Judiciary Transcript at p. 82 notes that this line is unintelligible.

rather he was learning of these allegations for the first time. In fact, later in the conversations, Dean said:

D. I know, sir, it is. Well I can just tell from our conversations that, you know, *these are things you have no knowledge of.* (Emphasis added.) (Judiciary Transcript, Mar. 21, 1973, a.m., p. 100.)

This evidence demonstrates that the President was not aware of any plot to obstruct justice with respect to the break-in at the Democratic National Committee. This fact is further illustrated by an analysis of each of the categories through which obstruction of justice by some persons has been alleged to have occurred: the interjection of CIA into the investigation; destruction of evidence; perjury and subornation of perjury; and payments to the "Watergate seven" defendants.

(a) The interjection of CIA into the investigation

The evidence of the President's role with respect to CIA and the investigation is clear, uncontradicted and totally exculpatory.

The theory that the CIA might have been involved, somehow, in the break-in of the Democratic National Committee originated not in any political circle, but within the Federal Bureau of Investigation. The theory was ostensibly based on some intrinsic evidence, although the previously deteriorated relationship, and, indeed, the antagonistic competition between the CIA and the FBI could have well enhanced the acceptability of the theory within the FBI. The testimony of L. Patrick Gray establishes that the origin of the CIA involvement theory was in the FBI and that Gray communicated the theory to Dean on the afternoon of June 22, 1973. Gray testified:

I met again with Mr. Dean at 6:30 p.m. the same day to again discuss the scheduling of interviews of White House staff personnel and to arrange the scheduling of these interviews directly through the Washington field office rather than through FBI headquarters. At this meeting I also discussed with him our very early theories of the case; namely, that the episode was either a CIA covert operation of some sort simply because some of the people involved had been CIA people in the past, or a CIA money chain, or a political money chain, or a pure political operation, or a Cuban right wing operation, or a combination of any of these. I also told Mr. Dean that we were not zeroing in on any one theory at this time, or excluding any, but that we just could not see any clear reason for this burglary and attempted intercept of communications operation. (Gray 9 SSC 3451, Presidential Presentation, book I, tab 13a, p. 122.)

Dean's testimony confirms that Gray informed him on June 22, 1972, that one of the FBI theories of the case was that it was a CIA operation, and that Dean reported this information to Haldeman and Ehrlichman on June 23. Dean testified:

It was during my meeting with Mr. Gray on June 22 that we also talked about his theories of the case as it was beginning to unfold. I remember well that he drew a diagram for me showing his theories. At that time Mr. Gray had the following theories: It was a setup job by a double agent; it was a CIA operation because of the number of former CIA people involved; or it was someone in the reelection committee who was responsible. Gray also had some other theories which he discussed, but I do not recall them now, but I do remember that those I have mentioned were his primary theories.

* * * * * * *

On June 23 I reported my conversation with Gray of the preceding evening to Ehrlichman and Haldeman. (Dean 3 SSC 943, Presidential Presentation, book I, tab 13a, p. 123.)

Haldeman's testimony confirms that Dean reported to him the FBI's concern about CIA involvement, and that he in turn reported it to the President, who ordered Haldeman and Ehrlichman to meet with the CIA officials. Haldeman testified:

There was a concern at the White House that activities which had been in no way related to Watergate or to the 1972 political campaign, and which were in the area of national security, would be compromised in the process of the Watergate investigation and the attendant publicity and political furor. The recent public disclosure of the FBI wiretaps on press and NSC personnel, the details of the Plumbers operations, and so on, fully justifies that concern.

As a result of this concern and the FBI's request through Pat Gray to John Dean for guidance regarding some aspects of the Watergate investigation, because of the possibility of CIA involvement, the President directed John Ehrlichman and me to meet with the Director and Deputy Director of the CIA on June 23. We did so and ascertained from them that there had not been any CIA involvement in the Watergate affair and that there was no concern on the part of Director Helms as to the fact that some of the Watergate participants had been involved in the Bay of Pigs operations of the CIA. We discussed the White House concern regarding possible disclosure of non-Watergate-related covert CIA operations or other nonrelated national security activities that had been undertaken previously by some of the Watergate participants, and we requested Deputy Director Walters to meet with Director Gray of the FBI to express these conconcerns and to coordinate with the FBI, so that the FBI's area of investigation of the Watergate participants not be expanded into unrelated matters which could lead to disclosures of earlier national security or CIA activities. (Haldeman 7 SSC 2884, Presidential Presentation, book I, tab 14a, p. 126.)

The President's statement of May 22, 1973, completes the evidence of this transaction, and verifies the circumstances which led to the meeting of Haldeman and Ehrlichman with the CIA officials on June 23, 1972. The President stated:

Within a few days, however, I was advised that there was a possibility of CIA involvement in some way.

It did seem to me possible that, because of the involvement of former CIA personnel, and because of some of their apparent associations, the investigation could lead to the uncovering of covert CIA operations totally unrelated to the Watergate break-in.

In addition, by this time, the name of Mr. Hunt had surfaced in connection with Watergate, and I was alerted to the fact that he had previously been a member of the Special Investigations Unit in the White House. Therefore, I was also concerned that the Watergate investigation might well lead to an inquiry into the activities of the Special Investigations Unit itself.

In this area, I felt it was important to avoid disclosure of the details of the national security matters with which the group was concerned. I knew that once the existence of the group became known, it would lead inexorably to a discussion of these matters, some of which remain, even today, highly sensitive.

I wanted justice done with regard to Watergate; but in the scale of national priorities with which I had to deal—and not at that time having any idea of the extent of political abuse which Watergate reflected—I also had to be deeply concerned with insuring that neither the covert operations of the CIA nor the operations of the Special Investigations Unit should be compromised. Therefore, I instructed Mr. Haldeman and Mr. Ehrlichman to insure that the investigation of the break-in not expose either an unrelated covert operation of the CIA or the activities of the White House investigations unit—and to see that this was personally coordinated between General Walters, the Deputy Director of the CIA, and Mr. Gray of the FBI. It was certainly not my intent, nor my wish, that the investigation of the Watergate break-in or of related acts be impeded in any way. (9 Weekly Compilations of Presidential Documents 693.) (May 22, 1973, Presidential Presentation, book I, tab 15a, p. 133.)

From the evidence, it is thus clear that the President, stimulated by the FBI's theory of possible CIA involvement, which had been relayed

to him through Dean and Haldeman, on the morning of June 23, 1972, directed Haldeman that Haldeman and Ehrlichman meet with CIA officials to insure that the FBI investigation not expose an unrelated covert operation of the CIA.

There is absolutely no evidence of any other action by the President with respect to the FBI's investigation as it related to the CIA.

It is relevant to note that the uncertainty regarding the possible uncovering of CIA activities was recognized in a memorandum dated June 28, 1972, from Helms to Walters that stated that it was still the CIA's position—

> that they [FBI] confine themselves to the personalitise already arrested or directly under suspicion and that they desist from expanding this investigation into other areas which may well, eventually, run afoul of our operations. (Special staff presentation, book II, vol. 3, tab 41.1, p. 472.)

Moreover, it was not until July 6, 1972, that the CIA categorically informed the FBI that it had no objections to an unlimited Watergate investigation. The President, also on July 6, 1972, clearly indicated to Gray that he did not want a coverup, for he told Gray, "Pat, you just continue to conduct your aggressive and thorough investigation." (Gray 9 SSC 3462, Presidential Presentation, book I, tab 15b, p. 135.)

It is also clear that Dean's subsequent attempts to involve the CIA in a coverup were independent of and subsequent to the President's instructions to Haldeman on the morning of June 23, 1972.

Dean testified that he met with John Mitchell, Robert Mardian, and Fred LaRue either on Friday afternoon, June 23, or on Saturday morning, June 24. (Dean SSC 944.) Dean testified that at this meeting he told the others about the FBI theory of CIA involvement, and that it was suggested that CIA "could take care of this entire matter." (Dean 3 SSC 945–46.) It was the conversation on the afternoon of June 23, 1972, or the morning of June 24 that led to Dean's approach to CIA Deputy Director Walters on Monday, June 26, 1972. (Dean 3 SSC 946.)

It is clear from all the evidence that even the idea that the CIA "could take care of this entire matter" originated subsequent to the President's instructions to Haldeman, and subsequent to the meeting of Haldeman and Ehrlichman with CIA officials on June 23, 1972. There is not the slightest hint in the evidence that the President was aware that subsequent to his legal and entirely appropriate precautionary action on the morning of June 23, 1972, Dean, at the instigation of others undertook to directly involve CIA in a coverup.

(*b*) *Destruction of evidence*

The President was unaware that political evidence had been destroyed and it should be noted that neither Dean nor any of the other participants had ever alleged that the President was aware of this; moreover, it is pure speculation to suggest the contrary. It is evident, for example, that the President was not aware that Gray had destroyed documents found in Hunt's safe until April of 1973. On April 17, Petersen explained to the President what had occurred:

> HP. Yes, sir—I'll tell you what happened. He said he met with Ehrlichman—in Ehrlichman's office—Dean was there and they told him they had some stuff in Hunt's office that was utterly unrelated to the Watergate case. They gave him two manila envelopes that were sealed. He took them. He says, they said

get rid of them. Dean doesn't say that. Dean says I didn't want to get rid of them so I gave them to Gray. But in any event, Gray took them back, and I said Pat where are they, and he said, "I burned them." And I said—

P. *He burned them?* (Emphasis added.) (White House Transcript, Apr. 17, 1973, p. 1098, Presidential Presentation, book I, tab 16a, p. 138.)

Nor was the President aware until Petersen informed him on April 16, 1972, that two notebooks were missing from Hunt's office, and both, even then, were unaware that Dean had destroyed this evidence.

HP. By the way Mr. President, I think that.

P. (Inaudible) evidence—not evidence? (Inaudible) explain that the evidence was not evidence—is that right? The stuff out of his safe?

HP. Well—that's.

P. What would you get after him on this—destruction of evidence?

HP. Well you see the point of it is—there are two other items that—according to the defense—Hunt's defense—that were missing. Both of which were notebooks.

P. Hunt's notebooks?

HP. And we can't find those notebooks. Dean says, Fielding says, and Kehrli says, they have no recollection of those notebooks.

P. Yeah.

HP. Hunt says they were there, and—

P. So—

HP. So only to the extent that the notebooks are missing which Hunt says they're germane.

P. (Inaudible) does he tell us very much, huh?

HP. No, sir. (White House Transcript, Apr. 16, 1973, p.m., p. 910.)

Dean did not disclose this fact even in his Senate testimony. It was not until November 5, 1973, when he appeared before the court and admitted for the first time destroying this evidence. (Special staff presentation, book II, vol. 3, tab 45.6, p. 512.)[7]

There is no information which would even tend to show that the President knew of the destruction of evidence until many months after the fact.

(c) Knowledge of perjury

The President was also unaware prior to March 21, 1973, that Magruder and Porter perjured themselves by stating to a grand jury that Liddy was authorized to spend up to $250,000 to gather intelligence information for use in attempting to prevent disruptions at the Republican convention and at political speeches. This was apparent from the President's conversation with Dean on March 21, 1973.

D. Yeah. Magruder is totally knowledgeable on the whole thing.

P. Yeah.

D. All right, now, we've gone through the trial. We've—I don't know if Mitchell has perjured himself in the grand jury or not. I've never—

P. Who?

D. Mitchell. I don't know how much knowledge he actually had. I know that Magruder has perjured himself in the grand jury. I know that Porter has perjured himself, uh, in the grand jury.

P. Porter? (unintelligible)

D. He is one of Magruder's deputies. (Judiciary Transcript, Mar. 21, 1973, a.m., pp. 86–87.)

All the evidence shows conclusively that the President was not even aware until March 21, 1973, of the fact that Magruder and Porter had committed perjury.

[7] Special staff presentation refers to the "Statement of Information" of the Committee on the Judiciary, House of Representatives, May–June 1974.

Indeed, the President's warning to Ehrlichman and to Haldeman to avoid perjury belies any allegation that the President would countenance it.

P. You better damned well remember being—The main thing is this, John, and when you meet with the lawyers—and you, Bob, and I hope Strachan has been told—believe me—don't try to hedge anything before the damned grand jury. I'm not talking about morality, but I'm talking about the vulnerabilities. (White House Transcript, Apr. 17, 1973, p.m., p. 1022.)

(*d*) *Payment of hush money*

At no point in the exhaustive presentation of information by the special staff is there any indication that the President was aware of any hush money paid the Watergate defendants prior to March 21, 1973. It was not until Dean meets with the President on that morning that the President was informed for the first time of allegations of the payment of hush money. At that time Dean disclosed these events to the President for the first time. He told the President:

D. Uh, Liddy said, said that, you know, if they all got counsel instantly and said that, you know, "Well, we'll ride this this thing out." All right, then they started making demands. "We've got to have attorneys' fees. Uh, we don't have any money ourselves, and if—you are asking us to take this through the election." All right, so arrangements were made through Mitchell, uh, initiating it, in discussions that—I was present—that these guys had to be taken care of. Their attorneys' fees had to be done. Kalmbach was brought in. Uh, Kalmbach raised some cash. Uh, they were obv—, uh, you know, (Judiciary Transcript, Mar. 21, 1973, a.m., pp. 89–90.)

Dean then advised the President that in his opinion these payments constituted an obstruction of justice by saying:

D. the most troublesome post-thing, uh, because (1) Bob is involved in that; John is involved in that; I am involved in that; Mitchell is involved in that. And that's an obstruction of justice.

P. In other words the fact that, uh, that you're, you're, you're taking care of witnesses.

D. That's right. Uh,

P. How was Bob involved?

D. well, th—, they ran out of money over there. Bob had three hundred and fifty thousand dollars in a safe over here that was really set aside for polling purposes. Uh, and there was no other source of money, so they came over here and said, "You all have got to give us some money."

P. Right.

D. I had to go to Bob and say, "Bob, you know, you've got to have some—they need some money over there." He said, "What for?" And so I had to tell him what it was for 'cause he wasn't about to just send money over there willy-nilly. And, uh, John was involved in those discussions, and we decided, you know, that, you know, that there was no price too high to pay to let this thing blow up in front of the election. (Judiciary Transcript, Mar. 21, 1973, a.m., p. 90.)

Mitchell, Ehrlichman, and Haldeman all dispute Dean's allegations of obstructing justice, but there is no information that even remotely connects knowledge of the payments to the President prior to March 21, 1973.

C. The Evidence Establishes That the President Did Not Authorize the Payment of Howard Hunt's Attorney Fees

On March 1, 1974, a federal grand jury returned an indictment against seven individuals charging all defendants with one count of conspiracy in violation of title 18 U.S.C. sec. 371 and charging some of the defendants with additional charges of perjury, making false declarations to a grand jury or court, making false statements to agents of the Federal Bureau of Investigation and obstruction of justice.

It has recently been disclosed that the grand jury voted to name the President as one of the unindicted coconspirators referred to in the conspiracy count (count 1) of the indictment of March 1, 1974. It is apparent from an analysis of the indictment that the grand jury vote with respect to the President was related to the implications of a series of overt acts numbered 40 through 44 alleged in the indictment as follows:

> 40. On or about March 21, 1973, from approximately 11:15 a.m. to approximately noon, Harry R. Haldeman and John W. Dean, III, attended a meeting at the White House in the District of Columbia, at which time there was a discussion about the fact that E. Howard Hunt, Jr. had asked for approximately $120,000.
>
> 41. On or about March 21, 1973, at approximately 12:30 p.m. Harry R. Haldeman had a telephone conversation with John N. Mitchell.
>
> 42. On or about the early afternoon of March 21, 1973, John N. Mitchell had a telephone conversation with Fred C. LaRue during which Mitchell authorized LaRue to make a payment of approximately $75,000 and for the benefit of E. Howard Hunt, Jr.
>
> 43. On or about the evening of March 21, 1973, in the District of Columbia, Fred C. LaRue arranged for the delivery of approximately $75,000 in cash to William O. Bittman.
>
> 44. On or about March 22, 1973, John D. Ehrlichman, Harry R. Haldeman, and John W. Dean, III, met with John N. Mitchell at the White House in the District of Columbia, at which time Mitchell assured Ehrlichman that E. Howard Hunt, Jr. was not a "problem" any longer.

It is clearly the intended implication of these allegations that the President, at the meeting with Dean, subsequently joined by Haldeman, at 11:45 a.m. on March 21, 1973, authorized a payment of money to E. Howard Hunt, Jr. (alleged overt act No. 40) and that thereafter H. R. Haldeman communicated that authorization by telephone to John N. Mitchell (alleged overt act No. 41), who in turn communicated the authorization to Fred C. LaRue (alleged overt act No. 42); and that Fred C. LaRue, acting upon the authorization, arranged for the delivery to William O. Bittman, attorney for E. Howard Hunt, Jr. of approximately $75,000 in cash (alleged overt act No. 43).

The implication of the indictment was further buttressed by the dramatically staged circumstances involved in the return of the indictment into court, during the course of which the Assistant Special Prosecutor, in open court attended by representatives of virtually all the major media, handed up a sealed envelope to the Judge together

with a briefcase stated to contain grand jury materials and with a statement that the grand jury requested that the material be submitted to the House Committee on the Judiciary.

Coincidentally therewith, stories appeared in the media clearly recognizing the implications of the indictment and stating that the material handed up to the judge in open court charged the President with commission of a crime.

The evidence before the grand jury, which was transmitted by the grand jury to the committee, not only fails to support, but indeed, contradicts the allegation by the grand jury that the President was a coconspirator with respect to count 1 of the indictment. It is contradictory also to the implication of the alleged overt acts 40 through 44 of the indictment.

The clear implication of alleged overt act No. 40 is that the President, during his meeting with Dean and Haldeman authorized the payment of money to Hunt. The evidence is to the contrary.

Among the alternatives considered during the meeting were the payment of money generally and the payment of the amount demanded by Hunt, specifically. The mechanics of these alternatives, such as how the money could be raised and delivered, were explored.

Throughout the earlier, broadly exploratory part of the conversation, the President repeatedly expressed one view and then the opposite on the question of meeting Hunt's reported demand, throwing each in turn out for examination and discussion.

At one point in the conversation the President discards the suggestion entirely by saying:

P. That in the end, we are going to be bled to death, and it's all going to come out anyway, then you get the worst of both worlds. We are going to lose, and people are going to—

H. And look (unintelligible).

P. And we're going to look like we covered up. So that we can't do. (Judiciary Transcript, Mar. 21, 1973, a.m., p. 114.)

The inherent wisdom of this observation is such that an ultimately contrary decision would not be possible.

At another point, he inquired as to whether or not the money should be paid:

P. that's why your, for your immediate thing you've got no choice with Hunt but the hundred and twenty or whatever it is. Right?

D. That's right.

P. Would you agree that that's a buy time thing, you better damn well get that done, but fast?

D. I think he ought to be given some signal, anyway, to, to—

P. Yes

D. Yeah—You know.

P. Well, for C_____ sakes, get it in a, in a way that, uh—Who's who's going to talk to him? Colson? He's the one who's supposed to know him. (Judiciary Transcript, Mar. 21, 1973, a.m., p. 121.)

This obviously refers to Dean's suggestion that Hunt should be given some "signal" not money.

However, this was not the President's final word on the matter. Later, we find the President saying to Dean:

P. But, but my point is, do you ever have any choice on Hunt? That's the point.

D. [Sighs]

P. No matter what we do here now, John,

D. Well, if we—

P. Hunt eventually, if he isn't going to get commuted and so forth, he's going to blow the whistle. (Judiciary Transcript, Mar. 21, 1973, a.m., p. 125.)

Further on, the entire conversation takes a major turn. This turn becomes highly significant in light of the fact that the urgency of Hunt's immediate demand stemmed solely from the fact that his sentencing and imprisonment was 2 days away, and he reportedly was insisting on getting his financial affairs in order before he went to prison—so that meeting his immediate demand was at first seen as the only way to buy the time needed even to consider alternative courses; and of the further fact that the President saw Hunt's principal threat in terms not of Watergate disclosures, but rather of disclosure of the national security matters Hunt had been involved in as a member of the Plumbers.

As the conversation continues, Dean introduces a theme that the President immediately seizes on, and that increasingly comes to dominate the discussion: The possibility of calling a new grand jury. (Judiciary Transcript, Mar. 21, 1973, a.m., p. 119.)

Initially, the discussion centers on the advantages of a new grand jury as a preferable alternative to having the White House staff appear before the Ervin committee, and as a means by which the President could seize the initiative in launching the new investigation.

As the discussion develops, however, two other crucial advantages emerge—advantages which make the payment to Hunt unnecessary.

First, the President concludes that national security matters—his primary concern in connection with Hunt—would not have to be disclosed in a grand jury setting in contrast to a public hearing:

P. Including Ehrlichman's use of Hunt on the other deal? [the Ellsberg situation].

D. That's right.

P. You'd throw that out?

D. Uh, well, Hunt will go to jail for that too—he's got to understand that.

P. That's the point too, I don't think that—I wouldn't throw that out. I think I would limit it to—I don't think you need to go into every G__ damned thing Hunt has done.

D. No.

P. He's done some things in the national security area. Yes. True. (Judiciary Transcript, Mar. 21, 1973, a.m., pp. 125–126.)

The other, and very important, factor that emerged was that institution of a new grand jury proceeding could be used to delay sentencing—and thus to take the heat out of the Hunt demand, in effect mooting it, and making the immediate payment necessary as a means of buying time:

P. You see, the point is, the reason that time is of the essence, we can't play around with this, is that they're going to sentence on Friday. We're going to have to move the G__ damned thing pretty fast. See what I mean?

D. That's right.

P. So we've got to act, we really haven't time to (unintelligible).

D. The other, the other thing is that the Attorney General could call Sirica, and say that, "The Government has some major developments that it's considering. Would you hold sentencing for 2 weeks?" If we set ourself on a course of action.

P. Yep. yep.

D. Say, that "The sentencing may be in the wrong perspective right now. I don't know for certain, but I just think there are some things that, uh, I am not at liberty to discuss with you, that I want to ask that the, the court withhold 2 weeks sentencing."

H. So then the story is out: "Sirica Delays Sentencing Watergate For—"
D. I think, I think that could be handled in a way between Sirica and Kleindienst that it would not get out.
P. No.
D. Sirica tells me, I mean Kleindienst apparently does have good rapport with Sirica. He's never talked to him since this case has developed
H. or P. Why not?
D. but, uh—
P. That's helpful. Kleindienst could say that he's, uh he's working on something and would like, like to have a week. I wouldn't take 2 weeks. I would take a week. (Judiciary Transcript, Mar. 21, 1973, a.m., pp. 127–128.)

Clearly, this was seized on by the President as a preferable alternative to paying the hush money, a payment he saw the dangers of and saw as ultimately futile: and this is demonstrated conclusively in his final instructions as the meeting ended—instructions not to pay the money, but rather to move on the grand jury idea, to convene the meeting among Haldeman, Mitchell, Ehrlichman, and Dean, and in that meeting to consider the various means of proceeding:

P. Why doesn't the President—could, could the President call him in as Special Counsel to the White—to the, to the White House for the purpose of conducting an investigation, represent—uh, you see, in other words—rather than having Dean in on it.
D. I have thought of that. I have thought of that.
P. I have him as Special Counsel to represent to the grand jury and the rest.
D. That is one possibility.
P. Yeah.
H. On the basis that Dean has now become a principal, rather—
P. That's right.
H. than a Special Counsel.
D. Uh huh.
P. That's right.
D. Uh huh.
P. And that he's a—
D. And I, and I could recommend that to you.
P. He could recommend it, you could recommend it, and Petersen would come over and be the, uh—and I'd say, "Now—"
H. Petersen's planning to leave, anyway.
P. And I'd say, "Now."
D. Is he?
P. "I want you to get—we want to (1)—" We'd say to Petersen, "We want you to get to the bottom of the G--damned thing. Call another grand jury or anything else." Correct? Well, now you've got to follow up to see whether Kleindienst can get Sirica to put off—Right? If that is, if we—Second, you've got to get Mitchell down here. And you and Ehrlichman and Mitchell and let's—and—by tomorrow. (Judiciary Transcript, Mar. 21, 1973, a.m., pp. 128–129.)

Not once, from the time it first was suggested that the new grand jury proceeding could permit delay of sentencing and thereby make consideration of Hunt's demand no longer urgent, was there any suggestion that Hunt's demand be met.

The conclusion of the meeting is clear in its recognition that the blackmail and the coverup cannot continue:

H. John's point is exactly right, that the erosion here now is going to you, and that is the thing that we've got to turn off, at whatever the cost. We've got to figure out where to turn it off at the lowest cost we can, but at whatever costs it takes.
D. That's what, that's what we have to do.
P. Well, the erosion is inevitably going to come here, apart from anything, you know, people saying that uh, well, the Watergate isn't a major concern. It isn't. But it would, but it will be. It's bound to be.

D. We cannot let you be tarnished by that situation.
P. Well, I (unintelligible) also because I—Although Ron Ziegler has to go out—They blame the (unintelligible) the White House (unintelligible).
D. That's right.
P. We don't, uh, uh, I say that the White House can't do it. Right?
H. Yeah.
D. Yes, sir. (Judiciary Transcript, Mar. 21, 1973, a.m., p. 130.)

Neither of the other participants in the meeting came away with any impression that the President has authorized payments to Hunt. Haldeman concluded that the President rejected payment to Hunt. (White House Transcript, Apr. 17, 1973, p.m., p. 1034, Presidential Presentation, book I, tab 21b, p. 162.) Significantly, at no point in his testimony either before the Senate select committee or before the grand jury did even John Dean accuse the President of having authorized any payment to Hunt. Dean testified: "The money matter was left very much hanging at that meeting. Nothing was resolved." (Dean 4 SSC 1423, Presidential Presentation, book I, tab 21b, p. 163.) Although Dean's testimony changed slightly before the Judiciary Committee, the transcript of the meeting on the morning of March 22 with Haldeman and the President confirms that the payment of blackmail was out of the question.

P. Damn it—when people are in jail there is every right for people to raise money for them. [inaudible] and that's all there is to it. I don't think we ought to [inaudible]—there's got to be funds—I'm not being—*I don't mean to be blackmailed by Hunt—that goes too far*, but for taking care of these people that are in jail—my God they did this for—we are sorry for them—we do it out of compassion, yet I don't [inaudible] about that—people have contributed [inaudible] report on that damn thing—there's no report required [inaudible] what happens. Do you agree? What else [inaudible].
H. That's why I—it seems to me that there is no real problem on obstruction of justice as far as Dean is concerned, and, I think, it doesn't seem to me we are obstructing justice.
P. Yeah.
H. People have pled guilty.
P. Yeah.
H. When a guy goes and pleads guilty are you obstructing justice? [inaudible] His argument is that when you read the law that uh
P. *Yeah—but Dean didn't do it. Dean I don't think—I don't think Dean had anything to do with the obstruction. He didn't deliver the money—that's the point.* I think what really set him off was when Hunt's lawyer saw him at this party, and said Hunt needs a hundred and twenty thousand dollars—well that was—kind of very [inaudible]—that was a shot across the bow. *You understand that that would look like a straight damn blackmail if Dean had gotten the money* [inaudible]. You see what I mean? (Emphasis added.) (Excerpt of Meeting: The President and H. R. Haldeman, EOB Office, Mar. 22, 1973. (9:11–10:35 a.m.), delivered for the Record of the Judiciary Committee Hearing, July 18, 1974.)

These statements, made by the President *after* the delivery of the $75,000 to Hunt's attorney, make it crystal clear that not only did the President not authorize the payment to Hunt but also that he did not know that the money had already been delivered. Moreover, if Haldeman had some role in the delivery of the money to Hunt he certainly did not tell the President.

The conversations of the President with Haldeman, Ehrlichman and Dean in the afternoon of March 21, 1973, is further evidence that the President had not authorized any payment to Hunt earlier in the

day. During this conversation the President asks Dean for advice as to what should be done about Hunt's demand:

P. So then now—so the point we have to, the bridge you have to cut, uh, cross there is, uh, which you've got to cross, I understand, quite soon, is whether, uh, we, uh, what you do about, uh, his present demand. Now, what, what, uh, what (unintelligible) about that?

D. Well, apparently Mitchell and, and, uh, uh,

Unidentified. LaRue.

D. LaRue are now aware of it, so they know what he is feeling.

P. True. (Unintelligible) do something.

D. I, I have, I have not talked with either. I think they are in a position to do something, though.

P. It's a long road, isn't it? I mean, the way you look back on that, as John has pointed out here is that that's a, that's a, that's a long road.

D. It sure is. (Judiciary Transcript, Mar. 21, 1973, p.m., p. 133.)

It is inconceivable that the President would be asking for such advice if he had authorized the payment several hours earlier.

Any implication, therefore, of the allegation contained in count 40 of the indictment that the President authorized any action with respect to payments for Hunt are in conflict with the evidence.

Count 41 of the indictment alleges that H. R. Haldeman had a telephone conversation with John Mitchell about 12:30 p.m. on March 21, 1973. By the sequencing of this allegation, an implication is created that the question of a payment to Hunt was the subject of this conversation.

There is no evidence of any description that the subject of a payment to Hunt was discussed by Haldeman and Mitchell and there is substantial evidence that it was not. It is true that shortly after the meeting of the President with Haldeman and Dean, Haldeman did call Mitchell. However, this was not to request Mitchell to authorize the payment of Hunt's legal fees, as implied in the indictment, but rather to invite Mitchell to attend a meeting with him, Ehrlichman and Dean the next morning, as the President had requested be done. Dean confirms that this was the purpose of the call. (Dean 3 SSC 1000, Presidential presentation, book I, tab 23c, p. 176.)

The grand jury minutes disclose repeatedly unsuccessful efforts on the part of the assistant special prosecutor to establish that Haldeman had talked to Mitchell on that phone call about this payment, as indicated by Haldeman's testimony:

Q. Now following that meeting did there come a time when you had a conversation with John Mitchell who was then in New York City on the telephone?

A. Yes, I am sure they did. Let's see—March 21. Yes.

Q. Can you give us the best of your recollection of the time of the telephone conversation and the substance of it?

A. I don't have—I should qualify my previous answer. I am sure that there was a telephone conversation because one of the results of one of the outcomes of the March 21 meeting with Mr. Dean and the President was a request by the President that Mr. Dean, Mr. Ehrlichman, Mr. Mitchell and I meet that day or the following day to discuss some of these questions and then to report back to the President.

I feel sure that I called Mr. Mitchell to request his coming down for such a meeting.

Q. What do you recall of the conversation between yourself and Mr. Mitchell?

A. That's all I recall. I am really assuming that there was such a call. I think I called him. It is possible that someone else called him. My general recollection now would be that I had called him and said that the President wanted us to meet and asked him to come down.

Q. It is not the case that you discussed with more particularity the problems about which the President suggested you meet in your conversation with Mr. Mitchell?

A. Not that I recall, no.

Q. Is it your testimony that you do not recall saying to Mr. Mitchell in substance that the President's requested that you meet as to how to deal with Mr. Hunt's demand for substantial cash payments?

A. Not that I recall, no.

Q. Is it your testimony that you do not recall saying to Mr. Mitchell in substance that the President's requested that you meet as to how to deal with Mr. Hunt's demand for substantial cash payments?

A. Yes. I have no recollection of that being discussed.

Q. It is your testimony that—is it your testimony that in the telephone conversation with Mr. Mitchell you did not allude in any way to the subject matter about which you would be meeting the following day?

A. My recollection is that the subject matter about which we would be meeting was the general subject of how to deal with the overall—what has now become called the Watergate situation, as it stood at that time.

I don't recall the point that you raised as being the specific subject for the meeting.

Q. I'm sorry but your answer is not responsive to my question, most respectfully. I asked whether you did not recall alluding to the subject matter in your telephone conversation with Mr. Mitchell.

A. I don't recall alluding to the subject matter. My recollection would be that if I discussed the subject matter it would be in the context that I have just described. The purpose of the meeting was, as I recall it, to review the Watergate situation.

Q. Is it not a fact, Mr. Haldeman, that in your telephone conversation with Mr. Mitchell you stated to him in substance, or you asked him in substance, whether he was going to take care of Mr. Hunt's problem?

A. I don't recall any such discussion, no.

Q. When you say you do not recall any such discussion, that would be something you would recall, would it not, if you had such a discussion?

A. I would think so but I don't see that as having been the major point of discussion either at the time of the phone call to set up the meeting or at the meeting which took place on the 22d.

Q. You're talking now again about Mr. Hunt's specific request, is that correct?

A. Yes. (Special staff presentation, book III, vol. 5, tab 68.2, pp. 1121–23.)

During the course of the hearings, Congressman Wiggins inquired of Special Counsel John Doar as to whether there was any evidence that Haldeman did discuss this payment with Mitchell during that telephone call, and Mr. Doar responded that there was no such evidence. In regard to this point, testimony before the Judiciary Committee indicated:

ST. CLAIR. * * * During the course of that conversation did Mr. Haldeman in any form of words discuss the payment or prospective payment of moneys to Mr. Hunt or his attorney for legal fees?

MITCHELL. No, sir. (Mitchell HJC 3373.)

Count 42 of the indictment alleges that in the early afternoon of March 21, 1973, John Mitchell had a telephone conversation with Fred C. LaRue to make a payment of approximately $75,000 to and for the benefit of E. Howard Hunt.

Again the sequencing of the allegations raises the implication that Mitchell called LaRue to pass on an authorization he received from Haldeman. Any such implication is in stark conflict with the evidence.

First, the undisputed evidence is that Mitchell did not call LaRue, but that LaRue called Mitchell.

Mitchell's testimony before the Judiciary Committee about this conversation was:

MITCHELL. It is my testimony, Mr. St. Clair, that I had received a telephone call from Mr. LaRue, which to the best of my strong recollection was before I talked to Mr. Haldeman and whether it was on the 21st or prior to that time I am not certain.

* * * * * * *

ST. CLAIR. As I understand it, you have examined your telephone records and are satisfied that you did not place a call to Mr. LaRue on March 21; is that correct?

MITCHELL. There is no record on the basis of the toll charges furnished by the telephone company which shows any call from my office to Mr. LaRue on March 21.

ST. CLAIR. There are records that would show calls placed from your office to Mr. LaRue on other occasions; are there not?

MITCHELL. Many.

* * * * * * *

ST. CLAIR. Is it your best memory that the call or that the discussion you had with Mr. LaRue on the 21st, or as you say perhaps earlier, was initiated by Mr. LaRue and not by you?

MITCHELL. Yes, sir. (Mitchell HJC 3373–74; see also 4 SSC 1630–31, Presidential Presentation, book I, tab 24c, p. 183.)

LaRue's testimony before the House Judiciary Committee was consistent with Mitchell's:

LARUE. My best memory is that I placed the call in the morning. Whether I was successful or what time I was successful in getting Mr. Mitchell on the phone I just do not recall.

ST. CLAIR. Didn't you tell us that it was your best memory that you got him on the phone when you placed the call but you could not be certain about it? Or words to that effect?

LARUE. I do not recall, Mr. St. Clair, when I actually talked to Mr. Mitchell. My best recollection is, as I state, that I placed that call to him in the morning.

ST. CLAIR. And you received the authority that you were seeking from Mr. Mitchell as a result of that call?

LARUE. Yes, sir.

ST. CLAIR. Then following that, you placed a call to Mr. Bittman, did you not?

LARUE. Correct. (LaRue HJC 2914–15; see also Special staff presentation, book III, vol. 5, tab 71, pp. 1194–95.)

The evidence relating to the telephone call from LaRue to Mitchell on the morning of March 21, 1973, belies any implication of any initiative by Mitchell with respect to payments to Hunt. (LaRue HJC 2888, Mitchell HJC 3300, 3295, 3373.)

Not only are the implications of the sequencing of the allegations of counts 40–44 of the indictment unsupported by the evidence but, in addition, the evidence before the grand jury and the Judiciary Committee demonstrates the chain of events which actually did take place.

Prior to LaRue's call to Mitchell, and probably on the early morning of March 21, Dean called LaRue. Both Dean and LaRue confirm the time and substance of this conversation. Dean testified before the Judiciary Committee:

DEAN. When Mr. LaRue arrived in my office, he asked me what I was going to do about these demands and I told him that I didn't plan to do anything, that I was not in the money business.

He said, what do you think I should do?

And I said, I think you ought to get hold of John Mitchell.

ST. CLAIR. And what did he then say?

DEAN. He said fine and left the office. (Dean HJC 3601; see also special staff presentation, book III, vol. 5, tab 71.7, p. 1235.)

LaRue testified:

LARUE. Mr. Dean told me that there was a need for money, or that Mr. Hunt had a need for a rather large sum of money. As I recall, the figure was $60,000 for family support and $75,000 for his attorneys' fees. Mr. Dean told me that he was getting out of the money operation, that he did not want to have anything else to do with it and that he was just passing this information along to me for whatever use of it I wanted to to Mr. Bittman or through Mr. Bittman. (LaRue HJC 2890–91; see also special staff presentation, book III, vol. 5, tab 71.1, pp. 1193–94.)

From the evidence, it is clear that the initiative for the discussion of payments to Hunt between Mitchell and LaRue came from LaRue, because Dean had told LaRue, in Dean's words, "I was out of that business," or, in LaRue's words, "that he was not going to have any further involvement, contact, in the deliveries of moneys to the Watergate defendants. * * *" (Special staff presentation, book III, vol. 5, tab 71.7, p. 1235 and tab 71.1, p. 1194.)

The sequence of events which is supported by the evidence, therefore, is that Dean informed LaRue that he and the White House would have nothing to do with paying Hunt, and LaRue, acting on his own initiative, called Mitchell and sought Mitchell's advice. LaRue's testimony also demonstrates that it was LaRue, on his own, who was making decisions on the subject. LaRue decided to limit the payment to Hunt to $75,000 for attorneys fees and to ignore the amount demanded for maintenance. LaRue testified, "I think this was a decision I made myself." (Special staff presentation, book III, vol. 5, tab 71.1, p. 1195, LaRue HJC 2893). LaRue asked Mitchell's advice and Mitchell answered, "If I were you, I would continue and make the payment." (Mitchell HJC 3300.)

Thus, LaRue, after soliciting and obtaining Mitchell's advice, himself made the decision to make the payment to Hunt, just as he had made the decision to ignore the demand for an additional amount for maintenance.

This entire sequence—up to and including the authorization of the payment by Mitchell—took place independently of Haldeman's call to Mitchell; therefore, there is no way in which the Haldeman call could have been part of the chain authorization. As further evidence, the entire discussion among the President, Haldeman and Dean centered on the $120,000 figure, not the $75,000—and it was the $75,000, the amount discussed earlier between LaRue and Mitchell, that was paid, not the $120,000. Quite clearly, therefore, there is no basis whatever for implicating the President in the chain of events that led to the payment.

We see, therefore, that the indictment in *United States* v. *Mitchell, et al.*, was artfully contrived in order to suggest a pattern, or chain, of events that is belied by the evidence—in order, that is, to fashion an apparent chain beginning at the morning meeting among the President, Haldeman, and Dean on the morning of March 21, 1973, running from the President to Haldeman, from Haldeman to Mitchell, and from Mitchell to LaRue, and culminating in the payment of $75,000 by LaRue that night, and thus providing a basis for a grand jury vote that the President was a coconspirator in the crime alleged by the indictment. The fact, as we have seen from the evidence which the prosecutor had, is that the chain of events leading to the payment was quite separate: that it was initiated separately from Dean and

Haldeman's meeting with the President, that it proceeded on an entirely separate track, that in fact it did not in any way involve the President and in fact was concealed from the President. Dean himself stated as much when he admitted to the President on April 16, 1973:

D. I, I have tried, uh, all along to make sure that anything I passed to you myself didn't cause you any personal problems. (Judiciary Transcript, Apr. 16, 1973, a.m., p. 195.)

Moreover, although Dean had set in motion the chain of events that led to the delivery of the $75,000 to Hunt's lawyer, he at no time on March 21, 1973, informed the President that he had directed LaRue to Mitchell for approval of the payment to Hunt. If on March 21, Dean was as interested in ending the coverup as he would have the committee believe he might have informed the President that perhaps LaRue was implementing the delivery of the money while the President was in the process of deciding not to make the payment.

The indictment, therefore, is not only unsupported but is actually contradicted by the evidence. Like a composite photograph, the individual parts of this portion of the indictment may be literally correct; but the artful language and distorted juxtaposition of the parts resulted in a total impression that is grossly distorted insofar as the imputed involvement of the President in the Watergate coverup is concerned.

It has been alleged that on the afternoon of March 22, 1973, during a conversation with Ehrlichman, Haldeman, Mitchell, and Dean, the President indicated a desire to continue a coverup. Nothing could be farther from the truth. During this conversation the President and his aides were discussing whether or not executive privilege should be asserted at the Senate select committee hearings. Even a cursory reading of the transcript of this conversation reveals that the President was being advised that a broad assertion of executive privilege in the Senate would give the appearance of a coverup and that this should be avoided. The only rational interpretation of this conversation is that the President was attempting to decide how to avoid charges that he was affecting a coverup and not urging that a coverup be implemented. In fact, at one point in the conversation, after raising the possibility of a stonewall position in the Senate select committee, the President tells Mitchell that it was his preference that it not be done that way. (Judiciary Transcript, Mar. 22, 1973, pp. 147, 164, 183.)

Ultimately the President did waive executive privilege and all of his aides were permitted to testify freely before the Senate select committee and the grand jury.

D. The Evidence Establishes That the President Carried Out His Constitutional Responsibility To See That the Laws Were Enforced

Dean disclosed for the first time on March 21, 1973, that he had been engaged in conduct that might have amounted to obstruction of justice and allegations that other high officials and former officials were also involved. These matters were thoroughly probed by the President in his talk with Dean, with the President often taking the role of devil's advocate; sometimes merely thinking out loud.

Having received this information of possible obstruction of justice having taken place following the break-in at the DNC the President promptly undertook an investigation into the facts. The record discloses that the President started his investigation the night of his meeting with Dean on March 21, as confirmed by Dean in his conversation with the President on April 16, 1973:

P. And it was that time that I started my investigation.
D. That's right...

* * * * * * *

P. . . . That is when I became interested. I was—I became frankly interested in the case and I said, Now G-- damn it I want to find out the score." And I set in motion Ehrlichman, Mitchell and—not Mitchell but a few others. (Judiciary Transcript, Apr. 16, 1973, a.m., p. 197.)

At the meeting with Mitchell and the others on the afternoon of March 22, the President instructed Dean to prepare a written report of his earlier oral disclosures:

H. I think you (Dean) ought to hole up—now that you—for the weekend and do that.
P. Sure.
H. Let's put an end to your business and get it done.
P. I think you need a—that's right. Why don't you do this? Why don't you go up to Camp David. And, uh—
D. I might do that; I might do that. A place to get away from the phone.
P. Completely away from the phone and so forth. Just go up there . . . once you have *written it*, you will have to continue to defend (unintelligible) action. (Judiciary Transcript, Mar. 22, 1973, p.m., pp. 157–58.) (Emphasis supplied.)

Later during this same conversation the President said:

P. . . . I feel that at the very minimum we've got to have the statement and, uh, let's look at it, whatever the hell it is. If, uh, it opens up doors, it opens up doors, you know. (Judiciary Transcript, Mar. 22, 1973, p.m., p. 179.)

The recording of this conversation in which the President instructed Dean to go to Camp David to write a report should be compared with Dean's testimony in which he stated:

He [the President] *never at any time* asked me to write a report, and it wasn't until after I had arrived at Camp David that I received a call from Haldeman asking me to write the report up. (Dean 4 SSC 1385, Presidential Presentation, book I, tab 26a, p. 194.) (Emphasis supplied.)

Dean in fact did go to Camp David and apparently did some work on such a report but he never completed the task. The President then assigned Ehrlichman to investigate these allegations.

By as early as March 27, just 6 days after Dean's disclosures, the President met with Ehrlichman and Haldeman to discuss the evidence thus far developed and how it would be best to proceed.

Again the President stated his resolve that White House officials should appear before the grand jury:

P. . . . Actually if called, we are not going to refuse for anybody called before the Grand Jury to go, are we, John? (White House Transcript, Mar. 27, 1973, p. 315.)

The President then reviewed with Haldeman and Ehrlichman the evidence developed to that time. They stated that they had not yet talked to Mitchell and indicated this would have to be done. They reviewed what they had been advised was Magruder's current position as to what had happened and compared that with what Dean had told them. They reported that Hunt was before the grand jury that same day. It is interesting to note that neither the President, Haldeman, nor Ehrlichman say anything that indicate surprise in Hunt's testifying before the grand jury. If in fact he had been paid to keep quiet, it might have been expected that someone would have expressed at least disappointment that he was testifying before the grand jury less than a week later.

They confirmed to the President, as Dean had, that no one at the White House had prior knowledge of the Watergate break-in. Ehrlichman said, "There just isn't a scintilla of a hint that Dean knew about this." (White House Transcript, Mar. 27, 1973, a.m., p. 329.) The President asked about the possibility of Colson having prior knowledge and Ehrlichman said, "* * * his response * * * was one of total surprise. * * * He was totally nonplussed, as the rest of us." (White House Transcript, Mar. 27, 1973, p. 331.) Ehrlichman then reviewed with the President the earlier concern that they had for natioual security leaks and the steps taken to find out about how they occurred.

It was decided to ask Mitchell to come to Washington to receive a report of the facts developed so far and a call was placed to him for that purpose. (White House Transcript, Mar. 27, 1973, p.m., pp. 360–61.) It was also decided that Ehrlichman should also call the Attorney General and review the information on hand with him. It was during this meeting that the possibility of having a commission or a special prosecutor appointed in order to avoid the appearance of the administration investigating itself and a call was placed to former Attorney General Rogers to ask him to meet with President to discuss the situation. (White House Transcript, Mar. 27, 1973, pp. 352, 354–56, 363.)

The next day Ehrlichman, pursuant to the President's direction given the previous day, called Attorney General Kleindienst and among other things advised him that he was to report directly to the President [8] if any evidence turns up of any wrongdoing on the part of anyone in the White House or about Mitchell. (White House

[8] Petersen was also told to report directly to the President on the discovery of any wrongdoing in the White House. (Petersen HJC 4053.) This direct reporting procedure utilized with Kleindienst and Petersen was in keeping with the President's effort to personally investigate the Watergate affair without disclosing this information to those White House personnel potentially involved in the coverup.

Transcript, Mar. 28, 1973, p. 383.) Kleindienst raised the question of a possibility of a conflict of interest and suggests that thought be given to appointing a special prosecutor. (White House Transcript, Mar. 28, 1973, p. 385.)

On March 30, 1973, consideration was given to the content of a press briefing with respect to White House officials appearing before the grand jury. As a result thereof, Mr. Ziegler stated at the press briefing that day:

With regard to the grand jury, the President reiterates his instructions that any member of the White House staff who is called by the grand jury will appear before the grand jury to answer questions regarding that individual's alleged knowledge or possible involvement in the Watergate matter.

Even prior to the completion of Ehrlichman's investigation, the President was taking steps to get the additional facts before the grand jury. On April 8, 1973, on the airplane returning to Washington from California, the President met with Haldeman and Ehrlichman and directed they meet with Dean that day and urge him to go to the grand jury—"I'm not going to wait, he is going to go." (Ehrlichman 7 SSC 2757.) Haldeman and Ehrlichman met with Dean that afternoon from 5 to 7. At 7:33 p.m., Ehrlichman reported the results of that meeting to the President by telephone:

P. Oh, John, Hi.

E. I just wanted to post you on the Dean meeting. It went fine. He is going to wait until after he'd had a chance to talk with Mitchell and to pass the word to Magruder through his lawyers that he is going to appear at the grand jury. His feeling is that Liddy has pulled the plug on Magruder, and that (unintelligible) he thinks he knows it now. And he says that there's no love lost there, and that that was Liddy's motive in communicating informally. (White House Transcript, Apr. 8, 1973, p.m., p. 401, Presidential Presentation, book I, tab 28b, p. 20.)

Indeed, Dean did, in fact, communicate his intentions to Mitchell and Magruder not to support Magruder's previous testimony to the grand jury. (Dean 3 SSC 1006, Presidential Presentation, book I, tab 29a, p. 204.) This no doubt was the push, initially stimulated by the President, which got Magruder to go to the U.S. attorneys on the following Saturday, April 14, and change his testimony and Magruder and Dean's testimony were critical:

ST. CLAIR. Now, sir, to go back, what was it that to your knowledge, well "broke the case?" Was it Mr. Magruder's coming in and offering to change his testimony?

PETERSEN. Well, I think it was a combination of factors. It was one, Mr. Magruder coming in, and Mr. Dean coming in, and while the negotiations with Mr. Dean stumbled for a period of time, not only while we had the case, but after it was turned over to the Special Prosecutor, nevertheless, that was a fact of shattering import, coupled with Mr. Magruder's statement. And Mr. Magruder at or about the time he came in went about making his apologies, I am informed, to his erstwhile companions, and that was a factor which added to the momentum, tended to bring in Mr. LaRue. And Mr. LaRue indicated that in effect the jig was up. He was quite prepared to plead. All of these things developed, you know, in a matter of days in a very rapid fashion. (Petersen HJC 3921–22.)

On the morning of April 14, 1973, the President met again with Haldeman and Ehrlichman to discuss the Watergate matter. This was an in-depth discussion lasting more than 2½ hours. The obvious purpose was to review the results of 3 weeks' investigation on the part of Ehrlichman and Haldeman and determine what course of action they would recommend.

Several conclusions were reached at that meeting by the President. From Ehrlichman's report on what Ehrlichman called hearsay facts, the President concluded, with regard to Mitchell:

P. I'm not convinced he's guilty but I am convinced that he ought to go before a grand jury. (White House Transcript, Apr. 14, 1973, a.m., p. 445, Presidential Presentation, book I, tab 30a, p. 208.)

There was a discussion as to who would be the appropriate persons to talk to Mitchell and tell him that continued silence did not well serve the President. Ultimately, it was decided that Haldeman should call Mitchell to come to Washington and that Ehrlichman should talk to him.

With respect to Magruder, the President said:

P. We've come full circle on the Mitchell thing. The Mitchell thing must come first. That is something today. We've got to make this move today. If it fails, just to get back our position I think you ought to talk to Magruder.

H. I agree.

P. And you tell Magruder, now Jeb, this evidence is coming in you ought to go to the grand jury. Purge yourself if you've perjured and tell this whole story.

H. I think we have to.

P. Then, well, Bob, you don't agree with that?

H. No; I do. (White House Transcript, Apr. 14, 1973, a.m., pp. 477–478, Presidential Presentation, book I, tab 30b, p. 209.)

The President instructed Ehrlichman to see Magruder, also, and tell him that he did not serve the President by remaining silent.

The President's decision to urge Mitchell and Magruder to go to the grand jury was based on his recognition of his duty to act on the body of information Ehrlichman had reported to him:

E. Here's your situation. Look again at the big picture. You now are possessed of a body of fact.

P. That's right.

E. And you've got to—you can't just sit here.

P. That's right.

E. You've got to act on it. You've got to make some decisions and the Dean thing is one of the decisions that you have to make . . . (White House Transcript, Apr. 14, 1973, a.m., pp. 488–489.)

At another point in the discussion, the same point was reiterated:

E. Well, you see, that isn't, that kind of knowledge that we had was not action knowledge, like the kind of knowledge that I put together last night. I hadn't known really what had been bothering me this week.

P. Yeah.

E. But what's been bothering me is—

P. That with knowledge, we're still not doing anything.

E. But what's been bothering me is—

P. That's exactly right. The law and order. That's the way I am. You know it's a pain for me to do it—the Mitchell thing is damn painful. (White House Transcript, Apr. 14, 1973, a.m., p. 499.)

A decision was reached to speak to both Mitchell and Magruder before turning such information as they had developed over to the Department of Justice in order to afford them "an opportunity to come forward." The President told Ehrlichman that when he met with Mitchell to advise him that "the President has said let the chips fall where they may. He will not furnish cover for anybody." (White House Transcript, Apr. 14, 1973, a.m., p. 507, Presidential Presentation, book I, tab 30c, p. 210.)

The President summed up the situation by stating:

P. No, seriously, as I have told both of you, the boil had to be pricked. In a very different sense—that's what December 18th was about. We have to prick the boil and take the heat. Now that's what we are doing here. We're going to prick this boil and take the heat. I—am I overstating?

E. No; I think that's right. The idea is, this will prick the boil. It may not. The history of this thing has to be though that you did not tuck this under the rug yesterday or today, and hope it would go away. (White House Transcripts, Apr. 14, 1973, a.m., p. 509).

The decision was also made by the President that Ehrlichman should provide the information which he had collected to the Attorney General. Ehrlichman called the Attorney General, but did not reach him.

Mitchell came to Washington that afternoon and met with Ehrlichman. Immediately following that meeting, Ehrlichman reported to the President, stating Mitchell protested his innocence, stating:

You know, these characters pulled this thing off without my knowledge. . . I never saw Liddy for months at a time . . . I didn't know what they were up to and nobody was more surprised than I was . . . (White House Transcript, Apr. 14, 1973, a.m., p. 509.)

Ehrlichman said he explained to Mitchell that the President did not want anyone to stand mute on his account; that everyone had a right to stand mute for his own reasons but that the "interests of the Presidency . . . were not served by a person standing mute, for that reason alone." (White House Transcript, Apr. 14, 1973, p.m., p. 525.)

Ehrlichman said that he advised Mitchell that the information that had been collected would be turned over to the Attorney General and that Mitchell agreed this would be appropriate. (White House Transcript, Apr. 14, 1973, p.m., p. 532.)

Even later on April 14, Ehrlichman finally was able to reach Magruder and met with Magruder and his lawyers for the purpose of informing him that he should not remain silent out of any misplaced loyalty to the President. Ehrlichman found, however, that Magruder had just come from a meeting with the U.S. attorneys where he had told the full story as he knew it. (White House Transcript, Apr. 14, 1973, p.m., p. 630; see also, Magruder 2 SSC 808, Presidential Presentation, book I, tab 29b, p. 205.) Magruder told Ehrlichman what he had told the U.S. attorney, which Ehrlichman duly reported to the President. (White House Transcript, Apr. 14, 1973, p.m., p. 582.)

During this meeting with the President, Ehrlichman's earlier call to the Attorney General was completed, and Ehrlichman spoke to the Attorney General from the President's office. Ehrlichman told the Attorney General that he had been conducting an investigation for about the past 3 weeks for the President as a substitute for Dean. (White House Transcript, Apr. 14, 1973, p.m., p. 629.) He also told him that he had reported his findings to the President the day before and that he had advised people not to be reticent on the President's behalf about coming forward. He informed the Attorney General that he had talked to Mitchell and had tried to reach Magruder, but that he had not been able to meet with Magruder until after Magruder had conferred with the U.S. attorneys. He offered to make all of his information available if it would be in any way useful. (White House Transcript, Apr. 14, 1973, p.m., p. 635.)

Following the telephone call, Ehrlichman said that the Attorney General wanted him to meet with Henry Petersen the next day regarding the information he had obtained. During the course of the conversation relating to Magruder changing his testimony the President stated:

P. It's the right thing. We all have to do the right thing. Damn it! We just cannot have this kind of business, John. Just cannot be. (White House Transcript, Apr. 14, 1973, p.m., p. 607.)

Late on the evening of April 14, after the White House correspondents' dinner the President spoke by telephone first with Haldeman and then with Ehrlichman. The President told each that he now thought all persons involved should testify in public before the Ervin Committee. (White House Transcript, Apr. 14, 1973, p.m., p. 646, 648.)

On the morning of Sunday, April 15, the President talked with Ehrlichman and told him that he had received a call from the Attorney General who had advised him that he had been up most of the night with the U.S. attorney, and with Assistant Attorney General Petersen. (White House Transcript, Apr. 15, 1973, a.m., p. 669.) The Attorney General had requested to see the President, personally, the President told Ehrlichman, and the President had agreed to see him after church. The President and Ehrlichman again reviewed the available evidence developed during Ehrlichman's investigation and the status of relations with the media.

In the early afternoon of April 15, the President met with Attorney General Kleindienst. (White House Transcript, Apr. 15, 1973, p.m., p. 696 et seq.) Kleindienst confirmed to the President that the U.S. attorneys had broken the case and knew largely the whole story as a result of Magruder's discussions with them and from disclosure made by Dean's attorneys, who were also talking to the U.S. attorney. The Attorney General anticipated indictments of Mitchell, Dean, and Magruder and others, possibly including Haldeman and Ehrlichman. Kleindienst indicated that he felt that he could not have anything to do with these cases especially because of his association with Mitchell, Mardian, and LaRue. The President expressed reservations about having a special prosecutor:

P. First, it's a reflection—it's sort of an admitting *mea culpa* for our whole system of justice. I don't want to do that. (White House Transcript, Apr. 15, 1973, p.m., p. 712.)

The President then suggested that Kleindienst step aside and that the Deputy Attorney General, Dean Sneed, be placed in charge of the matter. The President expressed confidence in Silbert doing a thorough job.

Kleindienst pointed out that even if he were to withdraw, his deputy is still the President's appointee and that he would be "in a tough situation. * * *" (White House Transcript, Apr. 15, 1973., p.m., p. 715.) Kleindienst recommended that a Special Prosecutor be appointed and a number of names were suggested. The President's reaction to the idea of a Special Prosecutor was negative:

P. . . . I want to get some other judgments because I—I'm open on this. I lean against it and I think it's too much of a reflection on our system of justice and everything else. (White House Transcript, Apr. 15, 1973, p.m. p. 742, Presidential Presentation, book I, tab 31a, p. 212.)

Following a further review of the evidence, Kleindienst raised the question about what the President should do in the event charges are made against White House officials. The President resisted the suggestion that they be asked to step aside on the basis of charges alone:

P. . . . the question really is basically whether an individual, you know, can be totally, totally—I mean, the point is, if a guy isn't guilty, you shouldn't let him go.

K. That's right, you shouldn't.

P. It's like me—wait now—let's stand up for people if there—even though they are under attack. (White House Transcript, Apr. 15, 1973, p.m., p. 724.)

Further discussion on this subject included the suggestion that Assistant Attorney General Henry Petersen might be placed in charge rather than the Deputy Attorney General. Kleindienst pointed out, "He's the first career Assistant Attorney General I think in the history of the Department."

Shortly after this, the tape at the President's office in the Executive Office Building ran out. It is clear, however, from a recorded telephone conversation between the President and Kleindienst that he and Henry Petersen met later in the afternoon with the President. This was verified by Petersen's testimony before the Senate committee. It was during this meeting that the President assigned the responsibility for the ongoing investigation to Petersen and instructed Petersen to do what had to be done to get at the truth. (Petersen HJC 3862.) It should be noted that at this meeting Petersen recommended that the President not name a Special Prosecutor, because that would be tantamount to a confession that the Department of Justice was unable to competently perform this assignment. (Petersen HJC 3860.)

At his meeting with the President, Assistant Attorney General Petersen presented to the President a summary of the allegations which related to Haldeman, Ehrlichman, and Strachan, and that the summary indicated no case of criminal conduct by Haldeman and Ehrlichman at that time. (Petersen 9 SSC 3632, exhibit 147, 9 SSC 3875–76, Presidential Presentation, book I, tab 31b, p. 213.)

The President, on the afternoon of April 15, 1973, had every reason to believe that the Department of Justice was moving rapidly to complete the case. He continued to attempt to assist. He had four telephone conversations with Petersen after their meeting. In the afternoon, having been told that Liddy would not talk unless authorized by higher authority, who all assumed was Mitchell, the President directed Petersen to pass the word to Liddy through his counsel that the President wanted him to cooperate. Subsequently, the President told Petersen that Dean doubted Liddy would accept the word of Petersen, so Petersen was directed to tell Liddy's counsel that the President personally would confirm his urging of Liddy to cooperate. The President stated:

P. I just want him (Liddy) to be sure to understand that as far as the President is concerned everybody in this case is to talk and to tell the truth. You are to tell everybody, and you don't even have to call me on that with anybody. You just say those are your orders. (White House Transcript, Apr. 15, 1973, p.m., p. 769, Presidential Presentation, book I, tab 31c, p. 216; see also Petersen 9 SSC 3650.)

The President continued to seek additional facts and details about the whole matter. However, while the President wanted Petersen to

report directly to him about the unfolding developments in this case the President did not want Petersen to inform him about the grand jury proceedings even though Petersen believed the President was entitled to this information, because the President believed this would be improper. Petersen stated:

DOAR. Did you have any discussion with the President during that 10-day period with respect to the use of grand jury material?

PETERSEN. In the course of the conversation, the President indicated that he wanted to be advised of the scope of matter of these things, but that he did not want grand jury information. Implicit in that, I think, was perhaps at least a thought in his mind that he was not entitled to grand jury information. I don't believe that is the law. I think the President as Chief Executive is entitled to grand jury information, at least to the extent that the prosecutor feels it appropriate to make that information available in the course of, in furtherance of his duties. Which is almost the language of rule 6(e). (Petersen HJC 3887–88.)

On April 16, 1973, the President learned from Petersen that LaRue had admitted his role in the coverup and indicated that he was talking freely with the prosecutors about the involvement of others. (White House Transcript, Apr. 16, 1973, pp. 966–67.)

On April 17, the President instructed Haldeman to make sure that Kalmbach was informed that LaRue was talking freely. (White House Transcript, Apr. 17, 1973, p. 983.) The President's purpose was not to suggest that Kalmbach lie to the prosecutors but rather that Kalmbach be made aware that others are cooperating with the prosecutors and that Kalmbach should also tell the truth. It was similar action by the President that resulted in Dean and Magruder cooperating with the prosecutors and the subsequent breaking of the case.

Thus, any suggestion that the President was using Petersen as an information source in order to perpetuate a coverup is ridiculous in light of the fact that the President told Petersen not to provide him with what would be the most important information if continuing the coverup was the President's purpose. Moreover, Petersen never gave the President any grand jury information. (Petersen HJC 3889.) Petersen could not reveal the details of the further disclosures by Dean's attorneys, so the President sought Petersen's advice about getting further information from Dean:

P. Right. Let me ask you this—why don't I get him in now if I can find him and have a talk with him?

HP. I don't see any objection to that, Mr. President.

P. Is that all right with you?

HP. Yes, sir.

P. All right—I am going to get him over because I am not going to screw around with this thing. As I told you.

HP. All right.

P. But I want to be sure you understand, that you know we are going to get to the bottom of this thing.

HP. I think the thing that—

P. What do you want me to say to him? Ask him to tell me the whole truth? (White House Transcript, Apr. 15, 1973, p.m., p. 765.)

After talking with Dean and reviewing Dean's further information, the President raised the question about when Dean and perhaps Haldeman and Ehrlichman should resign and Petersen responded, "We would like to wait, Mr. President." (White House Transcript, Apr. 15, 1973, p.m., p. 774.)

On the morning of April 16, the President began a long series of meetings on the entire subject of Watergate resignations. Being un-

certain of when the case would become public, the President decided he wanted resignations or requests for leave in hand from those against whom there were allegations. He had Ehrlichman draft such letters, and discussed them with Haldeman and Ehrlichman.

The President then met with Dean and discussed with him the manner in which his possible resignation would be handled. Dean resisted the idea of his resigning without Haldeman and Ehrlichman resigning as well. The President reviewed with Dean the disclosures Dean made to the President on March 21, and on the evening of April 15.

The President had some more advice for John Dean on this occasion:

P. Fine. Thank God, John. Don't ever do it, John. I want you to tell the truth. That's the thing that you're going to—I have told everybody around here, said "G__ damn it, tell the truth." 'Cause all they do, John, is compound it.

D. That's right.

P. That son-of-a-bitch Hiss would be free today if he hadn't lied about his espionage. He could have just said he—he didn't even have to. He could've just said, "I—look, I knew, Chambers. And, yes, as a young man I was involved with some Communist activities but I broke it off many years ago." And Chambers would have dropped it.

D. Well—

P. But the son-of-a-bitch lied, and he goes to jail for the lie rather than the crime.

D. Uh—

P. So believe me, don't ever lie with these bastards. (Judiciary Transcript, Apr. 16, 1973, a.m., p. 200.)

As to the President's action, he told Dean:

P. No, I don't want that, understand? When I say, "Don't lie," don't lie about me either.

D. No, I won't sir. You're—I, I'm not going— (Judiciary Transcript, Apr. 16, 1973, a.m., p. 204.)

The President met with Haldeman at noon on April 16 to discuss at length how and when Haldeman should make a public disclosure of his actions in the Segretti and Watergate matters. Haldeman reported that Mr. Garment recommended that he and Ehrlichman resign. (White House Transcript, Apr. 16, 1973, p.m., p. 829.) Garment had been assigned by the President on April 9 to work on the matter. The President stated that he would discuss that problem with William Rogers that afternoon and asked Haldeman to get with Ehrlichman and fill in Rogers on the facts. (White House Transcript, Apr. 16, 1973, p.m., p. 834.)

The President met in the early afternoon alone with Henry Petersen for nearly 2 hours in the Executive Office Building. They discussed the effect the Senate committee hearings would have on the trials in the event indictments are returned. (White House Transcript, Apr. 16, 1973, p.m., p. 846.)

The President then asked Petersen what he should do about Dean's resignation:

HP. Yes. As prosecutor I would do something different. But from your point of view I don't think you can sit on it. I think we have the information under control but that's a dangerous thing to say in this city.

P. Ah.

HP. And if this information comes out I think you should have his resignation and it should be effective . . . (White House Transcript, Apr. 16, 1973, p.m., p. 852.)

Petersen, however, urged the President not to announce the resignation if the information did not get out, as that would be "counterpro-

ductive" in their negotiations with Dean's counsel. Petersen reviewed the status of the evidence at length with the President with a view toward making a press release before an indictment or information was filed in open court.

During the course of the conversation Petersen informed the President that they were considering giving Dean immunity. As for Haldeman and Ehrlichman, Petersen recommended that they resign. The status of the situation was reviewed as follows:

P. Okay. All right come to the Haldeman/Ehrlichman thing. You see you said yesterday they should resign. Let me tell you they should resign in my view if they get splashed with this. Now the point is, is the timing. I think that's it. I want to get your advice on it, I think it would be really hanging the guy before something comes in if I say look, you guys resign because I understand that Mr. Dean in the one instance, and Magruder in another instance, made some charges against you. And I got their oral resignations last night and they volunteered it. They said, look, we want to go any time. So I just want your advice on it. I don't know what to do, frankly. [Inaudible] so I guess there's nothing in a hurry about that is there? I mean I—Dean's resignation. I have talked to him about it this morning and told him to write it out.

HP. [Inaudible.]

P. It's underway—I asked for it. How about Haldeman and Ehrlichman? I just wonder if you have them walk the plank before Magruder splashes and what have you or what not. I mean I have information, true, as to what Magruder's going to do. [Inaudible] nothing like this [inaudible].

HP. Or for that matter, Mr. President.

P. Yeah.

HP. Its confidence in the Office of the Presidency.

P. Right. You wouldn't want—do you think they ought to resign right now?

HP. Mr. President, I am sorry to say it. I think that mindful of the need for confidence in your office—yes.

P. [Inaudible] basis?

HP. That has nothing to do—that has nothing to do with guilt or innocence. (White House Transcript, Apr. 16, 1973, p.m., pp. 915–17.)

At the end of the meeting with Petersen, the President had every reason to believe that a public disclosure of the entire case in court would be made within 48 hours and perhaps sooner. The remaining questions for Presidential decision were: (1) What action he should take on the resignation, suspension or leave of Haldeman, Ehrlichman and Dean and whether it should be before or after they were formally charged; (2) what position he should take on immunity for Dean; and (3) what statement they should issue prior to the public disclosure in court.

On the afternoon of April 17, the President discussed the problem of granting immunity to White House officials with Henry Petersen. Petersen pointed out that he was opposed to immunity but he pointed out that they might need Dean's testimony in order to get Haldeman and Ehrlichman. The President agreed that under those circumstances he might have to move on Haldeman and Ehrlichman, provided Dean's testimony was corroborated. The President told Petersen:

P. That's the point. Well, I feel it strongly—I mean—just understand—I am not trying to protect anybody—I want the damn facts if you can get the facts from Dean and I don't care whether—

HP. Mr. President, if I thought you were trying to protect somebody, I would have walked out. (White House Transcript, Apr. 17, 1973, p.m., p. 1086.)

As for Dean, the President told Petersen:

P. . . . No I am not going to condemn Dean until he has a chance to present himself. No he is in exactly the same position they are in. (White House Transcript, Apr. 17, 1973, p.m., p. 1090.)

The President remained convinced, however, that a grant of immunity to a senior aide would appear as a coverup:

P. What you say—Look we are having you here as a witness and we want you to talk.
HP. That is described as immunity by estoppel.
P. I see, I see—that's fair enough.
HP. That is really the prosecutor's bargain.
P. That is much better basically than immunity—let me say I am not, I guess my point on Dean is a matter of principle—it is a question of the fact that I am not trying to do Dean in—I would like to see him save himself but I think find a way to do it without—if you go the immunity route I think we are going to catch holy hell for it.
HP. Scares hell out of me. (White House Transcript, Apr. 17, 1973, p.m., p. 1092.)

The President went over the draft of his proposed statement with Petersen. Petersen further counseled the President that no discussion of the facts of the case could be made without prejudicing the case and the rights of the defendants.

Later on the afternoon of April 17, the President announced to the public: (i) that he had new facts and had begun his own investigation on March 21; (ii) that White House staff members who were indicted would be suspended, and if they were convicted, they would be discharged; and (iii) that all members of the White House staff would appear and testify before the Senate committee.

The President further stated that:

I have expressed to the appropriate authorities my view that no individual holding, in the past or present, a position of major importance in the administration should be given immunity from prosecution. (13 Weekly Compilation of Presidential Documents 387, Apr. 17, 1973.)

In addition, he stated that all White House staff employees were expected fully to cooperate in this matter.

After making his public statement, the President met with Secretary of State Rogers, and they were joined later by Haldeman and Ehrlichman. (White House Transcript, Apr. 17, 1973, p. 1137, et seq.) Secretary Rogers reiterated his advice that the President could not permit any senior official to be given immunity. (White House Transcript, Apr. 17, 1973, p.m., p. 1141.)

The President had concluded that he should treat Dean, Haldeman, and Ehrlichman in the same manner. Petersen had advised the President that action on Dean would prejudice the negotiations of the U.S. attorneys with Dean's lawyers, and that Dean's testimony might be needed for the case.

On the evening of April 19, the President met with Messrs. Wilson and Strickler, counsel retained by Haldeman and Ehrlichman upon recommendation of Secretary Rogers. Wilson and Strickler made strong arguments that Haldeman and Ehrlichman had no criminal liability and should not be discharged.

The President continued to struggle with the question of administrative action against his aides. On April 27, Petersen reported to the President that Dean's lawyer was threatening that unless Dean got immunity. "We will bring the President in—not this case but in other things." (White House Transcript, Apr. 27, 1973, p. 1261.) On

the question of immunity in the face of these threats, the President told Petersen:

P. All right. We have got the immunity problem resolved. Do it, Dean if you need to, but boy I am telling you—there ain't going to be any blackmail. (White House Transcript, Apr. 27, 1973, p. 1276, Presidential Presentation, book I, tab 33a, p. 224.)

Later, in that same meeting, the President was advised by Petersen that the negotiations with Dean's attorneys had bogged down, and action by the President against Dean, Haldeman, and Ehrlichman would now be helpful to the U.S. attorney. (White House Transcript, Apr. 27, 1973, p.m., pp. 1287–1293.)

Three days later, on April 30, the President gave a nationwide address. He announced that he accepted the resignation of Haldeman, Ehrlichman, Attorney General Kleindienst, and Dean. The President then announced the nomination of Elliot Richardson as the newAttorney General.

In summary, after the March 21 disclosure, the President conducted a personal investigation and, based on the results of this investigation and in coordination with the Department of Justice, took Presidential action and removed several key White House staff members from office. The President's action was a function of his constitutionally-directed power to see that the laws are "faithfully executed" and was well within the wide discretion afforded him under the executive power doctrine. The investigation the President conducted was proper and fulfilled his constitutional duty in every respect. As a consequence, every White House official against whom charges were made was removed from office.

II. NATIONAL SECURITY MATTERS

A. There Has Been No Showing That Any of the 17 Wiretaps Were Illegal

There was clear legal authority for the legality of warrantless national security wiretaps at the time the 17 wiretaps were conducted. *United States* v. *Clay*, 430 F. 2d 165 (5th Cir. 1970), *reversed on other grounds*, 403 U.S. 698 (1971); *United States* v. *Brown*, 317 F. Supp. 531 (E. D. La. 1970), *affirmed*, 484 F. 2d 418 (5th Cir. 1973). The Fifth Circuit Court of Appeals in the *Clay* decision held:

> No one would seriously doubt in this time of serious international insecurity and peril that there is an imperative necessity for obtaining foreign intelligence information, and we do not believe such gathering is forbidden by the Constitution or by statutory provision. [430 F. 2d at 172].

Foreign policy wiretapping has not been affected by the Supreme Court's decision to overrule warrantless domestic security wiretaps. *United States* v. *United States District Court*, 407 U.S. 297, 308 (1972) (also known as the *Keith* case). In the *Keith* decision, the Supreme Court carefully limited its opinion to domestic security wiretapping, expressing no opinion on national security wiretaps. In his concurring opinion in *Giordano* v. *United States*, 394 U.S. 310, 314 (1969), Justice Stewart notes that foreign policy wiretapping is still an open question. Although the constitutionality of foreign policy wiretaps has not been finally resolved by the Supreme Court, former Attorney General Elliot Richardson has stated that the Department of Justice is justified in relying on lower court decisions permitting warrantless national security wiretaps. (Presidential Presentation, book IV, tab 27a.)

The 17 wiretaps were legal then and still meet the current legal standards. The Third Circuit Court of Appeals in *United States* v. *Butenko*, 494 F. 2d 593 (3rd Cir. 1974), has held that warrantless foreign policy wiretapping does not violate the fourth amendment provided that the reasons for instituting the wiretap are reasonable. Unlike other fourth amendment cases, reasonableness is not judged by a probable cause standard. Instead, the interception of conversations is permissible when conducted solely for the purpose of gathering foreign intelligence information—particularly when wiretapping is used as a tool for impeding the flow of sensitive information from the Government. *Butenko*, *supra*, at 601.

The evidence of the circumstances surrounding these 17 wiretaps demonstrates clearly that they involved national security. The Government was faced with massive leaks of sensitive foreign policy information when the President was just beginning to establish policies or future relations with other nations. (Presidential Presentation, book IV, tab 19b.)

These leaks began in the spring of 1969, when the President was exploring solutions to the Vietnam war. Following a National Security Council meeting on March 28, 1969, the President directed that several studies be conducted on alternative solutions to the Vietnam war, and one alternative to be studied was a unilateral troop withdrawal. The study directive was issued on April 1, 1969, and on April 6, 1969, the *New York Times* printed a front page article indicating that the United States was considering unilateral withdrawal from Vietnam. (Presidential Presentation, book IV, tab 19a.) Similarly in early June 1969, shortly after the decision had been reached to begin the initial withdrawal of troops from Vietnam, *The Evening Star* and *The New York Times* reported this decision indicating that it would be made public following the President's meeting with South Vietnam's President Nguyen Van Thieu. (Presidential Presentation, book IV, tabs 20a and 20b.)

These leaks were particularly damaging to the diplomatic efforts being made to end the Vietnam war. In this connection, Henry Kissinger stated:

> Each of the above disclosures was extremely damaging with respect to this Government's relationship and credibility with its allies. Although the initial troop withdrawal increment was small, the decision was extremely important in that it reflected a fundamental change in U.S. policy. For the South Vietnamese Government to hear publicly of our apparent willingness to consider unilateral withdrawals, without first discussing such an approach with them, raised a serious question as to our reliability and credibility as an ally. Similarly, though in a reverse context, these disclosures likewise impaired our ability to carry on private discussions with the North Vietnamese, because of their concern that negotiations could not, in fact, be conducted in absolute secrecy. (Presidential Presentation, book IV, tab 20c.)

Some of the most damaging leaks occurred with regard to the SALT negotiations. On January 20, 1969, when the President first took office, he immediately directed that an overall study be undertaken regarding the U.S. strategic force posture for the internal use of the Government and for use in the SALT negotiations. A fundamental requirement of this study was to determine what programs should be adopted to insure credibility of our country's deterrent capability. The study included an analysis of five possible strategic options from an emphasis of offensive capabilities to heavy reliance on antiballistic missile systems. The costs for the various approaches were included. Notwithstanding the need for secrecy of this study, the May 1, 1969, edition of the *New York Times*, reported the five strategic options under study with close estimates of the costs for each option. These options were published before they were considered by the National Security Council. (Presidential Presentation, book IV, tab 22a.)

In addition to the above study, the U.S. Intelligence Board (USIB) had been engaged in an analysis of the Soviet Union's testing of missiles, and in early June of 1969 issued a report setting forth their estimate of the Soviet Union's strategic strength and possible first strike capability. On June 18, 1969, the *New York Times* published this same official assessment of the first-strike capabilities of the Soviet Union. (Presidential Presentation, book IV, tab 23a.)

The damaging nature of these disclosures was summed up by Henry Kissinger stating:

> Each of these disclosures was of the most extreme gravity. As presentations of the Government's thinking on these key issues, they provided the Soviet Union with extensive insight as to our approach to the SALT negotiations and severely compromised our assessments of the Soviet Union's missile testing and our apparent inability to accurately assess their exact capabilities. . . .
>
> [The disclosure of the assessment of the Soviet's first-strike capability] . . . would provide a useful signal to the Soviet Union as to the . . . efficacy of our intelligence system. It would also prematurely reveal the intelligence basis on which we were developing our position for the impending strategic arms talks. (Presidential Presentation, book IV, tab 23b.)

Finally, the June 3, 1969, edition of the *New York Times*, reported that the President had determined to remove nuclear weapons from Okinawa in the upcoming negotiations with Japan over the reversion of the island. The article stated that the President's decision had not yet been communicated to Japan. (Presidential Presentation, book IV, tab 24a.) This disclosure had significant impact on the negotiations the United States was undertaking with Japan as noted by Henry Kissinger:

> The consequences of this disclosure, attributed to well-placed informants, in terms of compromising negotiating tactics, prejudicing the Government's interest, and complicating our relations with Japan were obvious, and clearly preempted any opportunity we might have had for obtaining a more favorable outcome during our negotiations with the Japanese. (Presidential Presentation, book IV, tab 24b.)

Thus, it can be seen that the leaks which occurred in 1969 were extremely damaging to the national security of the United States. The reasonableness and legality of the wiretaps should be determined by an examination of the circumstances surrounding the institution of the taps rather than the results. In light of the consequences of the leaks, these wiretaps were clearly justified. The reasonableness and legality of the taps is buttressed by the fact that the wiretaps did produce useful information about NSC personnel which were providing national security information to outsiders.

In June 1973, the FBI completed a background report on the 17 wiretaps, and reported that the intercepted conversations were "replete with details, gossip, and loose talk about . . . matters handled by the staff of NSC." (Presidential Presentation, book IV, tab 26a.) Specifically, the FBI reported that several of the NSC staff members had extensive contacts with members of the press. In particular, two former employees, X [9] and L, discussed many aspects of the internal workings of the NSC with Y, a newsman. X held extensive discussions on Southeast Asian policies with Y and others. Various FBI documents suggest that Y may have aided foreign governments in gathering intelligence information in the past. X, Y, and L were three of the subjects of these wiretaps. (Presidential Presentation, book IV, tab 26a.)

The records of the FBI indicate that the information obtained was put to good use to prevent further leaks. The FBI reported that the

[9] Names have been deleted to protect the rights of the individuals.

wiretaps had been helpful in "evaluating key persons on the White House staff, and in making a determination as to whether each could be trusted with highly classified information." (Presidential Presentation, book IV, tab 26a.) The FBI documents also reflect that X's employment with the Government was terminated as a result of the information gathered through this wiretap. (Presidential Presentation, book IV, tab 26k.)

Based on the damage being caused by these leaks of national security information, the Government was completely justified in using these wiretaps to help stem the flow of critical information out of the Government to the front pages of the Nation's newspapers. The Department of Justice met all of the legal requirements in undertaking these wiretaps. Certainly, the President committed no illegal act in instituting these wiretaps and, indeed, he would have failed in his constitutional responsibilities if he did not attempt to prevent further disclosure of national security information.

B. The Special Investigations Unit Was Created by the President in Response to a Threat to the National Security and Was Never Authorized To Commit Illegal Acts

The record before this committee [10] establishes beyonnd any doubt that President Nixon ordered the formation of the Special Investigations Unit, because of a threat to the national security and that, with one notable exception, the unit performed a legitimate and critical service to the Nation. Moreover, the record also conclusively establishes that the President never explicitly or implicitly authorized anyone associated with this unit to commit illegal acts and that he never ordered the entry at Dr. Lewis Fielding's office.

The Special Investigations Unit was created by President Nixon to combat the serious danger of unauthorized disclosures of classified information affecting the national security that had reached a critical point on June 13, 1971, with the *New York Times* publication of the Pentagon Papers. The President naturally was greatly concerned about the implications of this disclosure and he noted that:

> There was every reason to believe this was a security leak of unprecedented proportions.
>
> It created a situation in which the ability of the Government to carry on foreign relations even in the best of circumstances could have been severely compromised. Other governments no longer knew whether they could deal with the United States in confidence. Against the background of the delicate negotiations the United States was then involved in on a number of fronts—with regard to Vietnam, United States-Soviet relations, and others—in which the utmost degree of confidentiality was vital, it posed a threat so grave as to require extraordinary actions. (President Nixon's statement, May 22, 1973, 9 Presidential Documents 695, Special staff presentation, book VII, vol. 2, tab 31.1.)

This threat was acutely compounded by the involvement of Daniel Ellsberg, a former staff member of the National Security Council, and the prospect that Ellsberg might divulge additional information, and the realization that the Soviet Embassy had received a copy of the Pentagon Papers on June 17, 1971, and might be the recipient of additional classified information. As David Young stated in describing this period of uncertainty:

> . . . it was in the wake of the Pentagon Papers disclosure, considerable concern as to how serious a problem the leak was becoming, whether or not it was the Pentagon Papers themselves were a part of it, more extensive and wider effort to put out classified material. (David Young testimony, *United States* v. *Ehrlichman*, Cr. 74–116 (D.D.C. 1974) at p. 958.)

The President, therefore, appropriately considered the disclosure of the Pentagon Papers and the implications of that disclosure as a matter of paramount importance and he accordingly reacted in a number of ways.

The President's immediate reaction to this threat was to turn to the court in an attempt to prevent further disclosures of this material that

[10] The case of *United States* v. *Ehrlichman*, Cr. 74–116 (D.D.C. 1974), is of course relevant and when appropriate we shall also refer to that case.

had been taken from the most sensitive files of the Department of State and Defense and the CIA, and to have the FBI investigate this breach of national security. (Special staff presentation, vol. VII, book 2, tab 31.2–31.5; see also Colson HJC 4453.) The President also ordered a security clearance review by each department and agency of the Government having authority and responsibility for the classification of information affecting the national defense and security. (Presidential Presentation, vol. IV, tab 3a.) Colson was also assigned the responsibility of working with Congress in an effort to have a congressional hearing on the problem of security leaks. (Colson HJC 4449.) Moreover, the President devoted a great deal of his time discussing with Haldeman, Ehrlichman, Kissinger, and Colson the deleterious effect the publication of the Pentagon Papers had upon the national security and the effective conduct of our foreign policy. (Special staff presentation, book VII, vol. 2, tabs 33.1–33.2.) As Colson observed, this danger and the President's concern was very real:

I was in several meetings with the President in the period following the publication in the press of the "Pentagon Papers" in the New York Times, the Washington Post, and other papers. . . . During that period . . . the President repeatedly emphasized the tremendous gravity of the leaks and his concern that Ellsberg and/or Ellsberg's associates might continue the pattern. I can remember the President saying on a number of occasions that if the leaks were to continue, there would be no "credible U.S. foreign policy" and that the damage to the Government and to the national security at a very sensitive time would be severe. He referred to many of the sensitive matters that were then either being negotiated or considered by the administration, for example, SALT, Soviet détente, the Paris peace negotiations, and his plans for ending the war in Vietnam. (He had earlier made me aware of his desire to visit the Peoples Republic of China.) (Charles Colson affidavit, *United States* v. *Ehrlichman*, Apr. 29, 1974, pp. 1–2, special staff presentation, book VII, vol. 2, tab 33.2; see also Colson testimony HJC 4064 and the memorandum from Colson to Ray Price, July 3, 1971, Presidential Presentation, vol. VI, tab 6a.)

The President was also concerned that Ellsberg's action would be distorted and would endanger the success of the Vietnamese peace negotiations. Colson stated:

COLSON. I don't think those were the President's words so much as they were mine. I think he was concerned that he would become a martyr. He was concerned that he would be a rallying point. He had gotten a lot of national publicity at that point for his role in the Pentagon Papers release—tremendous national publicity. I think Dr. Kissinger, the President, myself, John Ehrlichman—we were all very concerned that—

ST. CLAIR. Why did this concern you? I'm sorry I cut you off. I'm sorry.

COLSON. Well, mid-1971, you have to remember that we had a tremendous outburst of domestic turmoil following the Cambodian operation in 1970. In the spring of 1971, the war was winding down, the casualties were down, the Laotian operation kind of brought public attitudes back a little bit, excited the public again a little more. But in the summer of 1971, when all of this was going on, there had been kind of a quieting of attitudes and a calming of feelings over the war as it was gradually deescalating and Dr. Ellsberg's actions threatened to turn it into a red hot issue again at a very time when Dr. Kissinger was engaged in the most sensitive negotiations in Paris trying to end the war. It just was a very—it was a time when we were trying very hard to keep public support for our policies, because that was crucial to, in our view at that time, to the North Vietnamese accepting the peace proposals that we were advancing through Dr. Kissinger in Paris. (Colson HJC 4398–4399.)

The President was also concerned that others might follow Ellsberg's example of making unauthorized disclosures of classified information. (Colson HJC 4401.)

While the President wanted to negate these possibilities, the President, however, never asked Colson to disseminate any information that was not true. (Colson HJC 4000–4001.)

In light of this danger to the national security which served to highlight the continuing problems of security leaks, the President's decision, however, to take additional action to prevent further leaks was clearly necessary and his failure to act would have been a dereliction of duty. The creation of the Special Investigations Unit was therefore the result of the President's assessment of the significance of the problem confronting the Nation and the determination the most efficacious means to eradicate this problem was to begin an extraordinary national security operation and there is not one iota of evidence in the record to indicate this was anything but a proper and legitimate decision by the President. The President observed:

> Therefore, during the week following the Pentagon Papers publication, I approved the creation of a Special Investigations Unit within the White House—which later came to be known as the "plumbers." This was a small group at the White House whose principal purpose was to stop security leaks and to investigate other sensitive security matters. (President Nixon's statement, May 22, 1973, 9 Presidential Documents 695, special staff presentation, book VII, vol. 2, tab 31.1.)

It is important to emphasize that the unit was created to function within the Government to stop security leaks in an entirely legal manner and that it was not established as a field operative investigative force. As Krogh stated:

> . . . on or about July 15, 1971, affiant was given oral instructions by Mr. John D. Ehrlichman, Assistant to the President of the United States for Domestic Affairs, to begin a special National Security project to coordinate a Government effort to determine the causes, sources, and ramifications of the unauthorized disclosure of classified documents known as the Pentagon Papers; . . . (Egil Krogh affidavit, *United States* v. *Krogh*, May 4, 1973, p. 1; Presidential Presentation, book IV, tab 7a; see also John Ehrlichman affidavit, *United States* v. *Ehrlichman*, Apr. 26, 1974, p. 6; special staff presentation, book VII, vol. 3, tab 47.2 and David Young testimony, *United States* v. *Ehrlichman*, Cr. 74–116 (D.D.C. 1974) at p. 1107).

Further, the unit did, in fact, operate in this manner. For example, on July 21, 1971, Young attended a meeting at CIA headquarters to discuss the Pentagon Papers, and on July 26, 1971, he attended a meeting at the State Department to discuss this same subject. (Presidential Presentation book IV, tab 10a and 12a.) It must also be remembered that in addition to the Pentagon Papers disclosure and the disclosure on July 23, 1971, by the *New York Times* of details of our country's negotiating position in the Strategic Arms Limitations (SALT) talks, the unit was also responsible for a number of other projects related to national security. There is nothing in the record that indicates that in these areas the unit did not operate within the governmental system and in a legal manner. (Special staff presentation, book VII, vol. 3, tab 52.1 and vol. 4, tab 60.1.)

The record also strongly suggests that the unit would have continued to function in this fashion and never have become a field operative investigative force involved in the entry of Dr. Fielding's office if Ehrlichman, Krogh, and Young were satisfied with the FBI's investi-

gation of the Ellsberg case. Krogh has described this situation in the following manner:

Q. Did you or Mr. Young discuss this matter of an entry in Dr. Fielding's office to examine these files with anyone else after the discussion with Mr. Young, or between Mr. Young and you and Mr. Hunt and Mr. Liddy?

A. Yes, I recall meeting; I recall a meeting that we had with Mr. Ehrlichman. I don't remember the precise date but August the 5th is the most reasonable date to me because it happened right about that period of time—we had scheduled a meeting with him on that date and we reported to him, as best I can recall, that the FBI had been unsuccessful in interviewing Dr. Fielding and that if we were to be able to examine these files then we would have to conduct an operation of our own.

I cannot give you the precise words on that but we were trying to convey to him that we felt that the unit would have to become operational—in other words, prior to that time the unit's principal or even exclusive responsibility was working through other departments and agencies.

That was the reason for meetings that had been established with the Secretary of Defense, the Attorney General, the director of the CIA—we had work with the security offices who had been assigned by these departments.

I suppose we were more a coordinating body as well as a body trying to encourage them to make more vigorous investigations.

This was the first time that the unit was going to become operational in the sense that our own employees would be directly involved and, to go beyond that, as I say, that initial franchise, we felt we needed authority to do. (Egil Krogh, *United States* v. *Ehrlichman*, Cr. 74–116 (D.D.C. 1974) at p. 1278–79. See also, *United States* v. *Krogh*, May 4, 1973, p. 2, Presidential Presentation, vol. IV, tab 7a.)

Ehrlichman indicated he informed the President of Krogh's concern:

Mr. Krogh complained of the FBI's failure to cooperate fully in the Ellsberg investigation. I discussed the problem with the Attorney General. He advised me of a continuing problem with Mr. Hoover. I recall specifically Mr. Krogh complaining that the FBI had not even designated the Ellsberg case as a primary or priority case.

I advised Krogh of my talk with the Attorney General and he recommended that some of the unit's people be sent out to quickly complete the California investigation of Ellsberg.

I told the President of these conversations, sometime between July 26 and August 5, as nearly as I can now reconstruct it.

He responded that Krogh should, of course, do whatever he considered necessary to get to the bottom of the matter—to learn what Ellsberg's motives and potential further harmful action might be.

I told Krogh, in substance, that he should do whatever he considered necessary. (John Ehrlichman affidavit, *United States* v. *Ehrlichman*, Apr. 26, 1974, pp. 7–8; Presidential Presentation, vol. IV, tab 2c. See also Ehrlichman 6 SSC 2625 and Petersen JHC 3880.)

However what is critically important to note with respect to this shift in the Unit's *modus operandi* that culminated in the entry of Dr. Fielding's office on September 3, 1971, is that there is not one scintilla of evidence in the record that indicates that the President was aware of the entry let alone that the President authorized this entry.

The President has indicated that while he can understand how this action could have occurred he did not and would not have approved such an operation. President Nixon said:

Because of the extreme gravity of the situation, and not then knowing what additional national secrets Mr. Ellsberg might disclose, I did impress upon Mr. Krogh the vital importance to the national security of his assignment. I did not authorize and had no knowledge of any illegal means to be used to achieve this goal.

However, because of the emphasis I put on the crucial importance of protecting the National security, I can understand how highly motivated individuals could have felt justified in engaging in specific activities that I would have disapproved had they been brought to my attention.

Consequently, as President, I must and do assume responsibility for such actions despite the fact that I, at no time approved or had knowledge of them. (President Nixon's statement, May 22, 1973, 9 Presidential Documents 695, special staff presentation, book VII, vol. 2, tab 31.1. See also President Nixon's statement, Aug. 15, 1973, Presidential Presentation, book IV, tab 11b.)

Only John Dean has ever suggested the President did authorize the entry into Fielding's office and Egil Krogh clearly refuted Dean's implications when he stated:

It was in this context that the Fielding incident, the break-in into the offices of Dr. Ellsberg's psychiatrist, took place. Doubtless, this explains why John Dean has reported that I told him that instructions for the break-in had come directly from the Oval Office. In fact, the July 24 meeting was the only direct contact I had with the President on the work of the unit. I have just listened to a tape of that meeting, and Dr. Ellsberg's name did not appear to be mentioned. I had been led to believe by the White House statement of May 22, 1973, that the President had given me instructions regarding Dr. Ellsberg in the July 24, 1971, meeting. It must be that those instructions were relayed to me by Mr. Ehrlichman. In any event, I received no specific instruction or authority whatsoever regarding the break-in from the President, directly or indirectly. (Egil Krogh statement, Jan. 3, 1974, special staff presentation, book VII, vol. IV, tab 79.5.)

David Young never even discussed the Pentagon Papers or the Ellsberg break-in with the President:

Q. Did you have any discussions with the President of the United States about this?

A. I had no discussions with the President about the Pentagon Papers investigation or this matter here, the Ellsberg-Fielding matter. I had discussions with the President with regard to another leak investigation. (David Young testimony, *United States* v. *Ehrlichman*, Cr. 74–116 (D.D.C. 1974) at pp. 1120–21.)

Moreover in testimony before this committee, Colson has indicated not only did he not have any evidence that the President authorized the Fielding entry, but that Ehrlichman told Colson that he had not discussed in advance the Fielding entry with the President. (Colson HJC 4458, 4445.) It should be noted that Ehrlichman informed Colson of this fact in preparation for Ehrlichman's recent trial before Judge Gesell and at a time when Ehrlichman's defense on the grounds of national security would have been greatly enhanced by Ehrlichman's stating that the President authorized or was aware in advance of the Fielding entry. In fact, as the President has reiterated on many occasions it was not until March 17, 1973, that the President first learned of the break-in at Dr. Fielding's office. (See President Nixon's statement, Aug. 15, 1973, 9 Presidential Document 993, Presidential Presentation, book IV, tab 11b; President Nixon's letter to Judge Gesell, Apr. 29, 1974; President Nixon's answer to interrogatories, July 1974.)

The transcript of the President's conversation with Dean on March 17, 1973, clearly proves that this was the first time he was aware of the Unit's involvement in the Ellsberg break-in.

D. . . . The other potential problem is Ehrlichman's and this is—
P. In connection with Hunt?
D. In connection with Hunt and Liddy both.
P. They worked for him?

D. They—these fellows had to be some idiots as we've learned after the fact. They went out and went into Dr. Ellsberg's doctor's office and they had, they were geared up with all this CIA equipment—cameras and the like. Well they turned the stuff back in to the CIA some point in time and left film in the camera. CIA has not put this together, and they don't know what it all means right now. But it wouldn't take a very sharp investigator very long because you've got pictures in the CIA files that they had to turn over to (unintelligible).

P. What in the world—what in the name of God was Ehrlichman having something (unintelligible) in the Ellsberg (unintelligible)?

D. They were trying to—this was a part of an operation that—in connection with the Pentagon Papers. They were—the whole thing—they wanted to get Ellsberg's psychiatric records for some reason. I don't know.

P. This is the first I ever heard of this. I, I (unintelligible) care about Ellsberg was not our problem.

D. That's right. (White House Transcripts, Mar. 17, 1973, 1:25–2:10 p.m., pp. 157–158.)

Moreover, after being made aware of this fact, the President authorized Attorney General Kleindienst to report the break-in to Judge Byrne, despite the fact there was no legal obligation to report the break-in. (President Nixon's statement Aug. 15, 1973, 9 Presidential Documents 993, Presidential Presentation, book IV, tab 11b, Petersen HJC 3927–28.)

III. ITT

A. The President Did Not Cause a Settlement of the ITT Antitrust Cases in Consideration of Any Commitment Which ITT Made Toward the Financing of the 1972 Republican National Convention by the San Diego Business Community

Two events, separated by over 4 years, define the beginning and the end of the International Telegraph & Telephone Co. (ITT) controversy. In late December 1968, Richard W. McLaren received from Richard G. Kleindienst and John N. Mitchell a commitment that he would not be interfered with politically, with respect to a vigorous enforcement of antitrust laws, that is, all cases would be decided on the merits, if he accepted the position of Assistant Attorney General, Antitrust Division, Department of Justice. (Presidential Presentation, book II, tab 1.) On March 2, 1972, Judge McLaren, after describing that commitment, in response to a question from Senator Eastland, told the Senate select committee that the commitment had been kept. (Presidential Presentation, book II, vol. II, tab 1a, p. 117.) The second event, noted in the introductory pages of volume 1, book V of the special staff's presentation material, was the disclosure of Leon Jaworski, the Special Prosecutor, that:

> except as noted below, that part of the investigation relating to allegations of Federal criminal offenses by ITT executives in connection with the settlement of the antitrust cases announced on July 30, 1971, has failed to disclose the commission of any such violations and although the investigation is not being closed at this time, it is fair to say that there is no present expectation of a disclosure of such offenses. (May 30, 1974, letter from Leon Jaworski to Hon. J. J. Pickle, House of Representatives.)

McLaren, as Assistant Attorney General, Antitrust Division, was in charge of all aspects of the Government's three antitrust merger suits against ITT, including all aspects of the settlement negotiations and procedures. (Presidential Presentation, book II, tab 8b.) Because of former Attorney General Mitchell's early self-disqualification from involvement in the cases based on what he apparently perceived to be a potential conflict-of-interest situation, Deputy Attorney General Kleindienst had assumed the administrative responsibilities normally attendant upon the Attorney General in these cases. Although earlier settlement talk had occurred between ITT and Justice Department lawyers (Presidential Presentation, book II, tab 7a), it was on June 17, 1971, that the first concrete settlement offer was made to ITT by McLaren. On that date, McLaren, following an April 29, 1971, ITT economic presentation and an independent financial analysis by Richard Ramsden, recommended to Kleindienst that a settlement proposal be made to ITT which would allow that company to retain the Hartford Fire Insurance Co. Kleindienst approved the settlement proposal, relying upon the expertise of McLaren. (Presidential Presentation,

book II, tab 6b.) Between June 17, 1971, and July 31, 1971, the date of the final settlement, the details of the settlement were worked out by staff attorneys at the Department of Justice and ITT attorneys. (Special staff presentation, book V, vol. 2, tab 27.2.) According to ITT, settlement was reached on July 30, 1971, when the Justice Department agreed that ITT need only divest itself of the Fire Protection Division of Grinnell, a factor which ITT regarded as decisive in the settlement negotiations. (Presidential Presentation, book II, tab 8a.) McLaren agreed because he felt the partial divestiture would be a procompetitive step in the fire protection industry. (Presidential Presentation, book II, tab 8b; McLaren 2 KCH 113.[11]) McLaren and Solicitor General Griswold thought the settlement to be very favorable. (Griswold 2 KCH 374, 377; McLaren 2 KCH 114.) It should be noted that the latter, when authorizing appeal, thought the case (Grinnell) to be very hard. (Presidential presentation, book II, tab 4e.) His chief assistant, Daniel M. Friedman, Deputy Solicitor General, in recommending the appeal because of no practical alternative, characterized the case as extremely difficult and the chances of winning as minimal. (Presidential Presentation, book II, tab 4b.)

At the time of final settlement, neither McLaren nor Kleindienst was aware of any financial commitment by ITT to the San Diego Convention and Tourist Bureau in connection with the hosting of the 1972 Republican National Convention. (Presidential Presentation, book II, tabs 8f, 8g; McLaren 2 KCH 116, Kleindienst 2 KCH 100.) Both McLaren and Kleindienst testified that John N. Mitchell did not talk with them about the ITT cases. (McLaren-Kleindienst 2 KCH 124–125.) Mitchell confirmed their testimony on this point. (Presidential Presentation, book II, tab 8e.) In fact, Kleindienst did not talk with McLaren from June 17 until July 30 when McLaren called Kleindienst to tell him a settlement had been worked out by ITT and antitrust division lawyers and would be announced the following day. (Presidential Presentation, book II, tab 8c, Kleindienst 2 KCH 142.) There is not a scintilla of evidence to rebut McLaren's statement that the "Republican convention site and ITT's contribution had absolutely 100 percent nothing to do with the settlement I made." (Presidential Presentation, book II, tab 8g.)

There is no evidence, moreover, linking any action of the President to any ITT financial commitment. The only Presidential involvement in the ITT cases occurred on April 19 and 21, 1971, when he directed the appeal be dropped, but then reversed his position. Both actions were based upon broad policy considerations, rather than on the merits of the cases. (Special staff presentation, book V, vol. 1, tabs 14, 18.) Although Peter M. Flanigan, then Executive Director of the Council of Economic Policy, became a focal point of attention during the Kleindienst hearings, his role in the settlement picture was limited to locating at McLaren's request, Richard Ramsden, who made, at McLaren's request, a financial analysis which projected certain economic consequences if a forced divestiture of the Hartford Fire Insurance Co. by ITT occurred. Both McLaren and Flanigan described Flanigan's role as that of a conduit only. (McLaren 2 KCH 270; Flanigan 3 KCH 1586.)

[11] KCH refers to the printed record of the Kleindienst confirmation hearings.

On May 12, 1971, Harold S. Geneen, president of ITT, discussed with Congressman Bob Wilson (R-Calif.) during the time of the annual ITT shareholders' meeting, the feasibility of attracting the 1972 Republican National Convention to San Diego. Because the Sheraton Corp., an ITT subsidiary, was opening a new hotel in San Diego, Geneen was interested in the convention as a business promotional venture. (Special staff presentation, book V, vol. 2, tab 24.1.) Included in those discussions was talk of an ITT financial participation if the convention actually materialized in San Diego. The city of San Diego, after retracting its earlier decision not to submit a bid, on June 29, 1971, resolved, in essence, to submit a bid of $1.5 million to the Republican National Committee, $900,000 of which was to include contribution of cash and services from noncity sources. (Special staff presentation, book V, vol. 2, tab 28.1.) (This occurred 12 days after McLaren, with Kleindienst's approval, notified ITT of the Justice Department's settlement proposal.) Subsequently, on July 21, 1971, the Sheraton Corp. forwarded a telegram to the San Diego Convention and Tourist Bureau setting forth its financial commitment of, essentially, $200,000. (Special staff presentation, book V, vol. 2, tab 28.9.)

Because of the solidarity of evidence supporting the bona fide nature of the final settlement of the ITT antitrust litigation and the absence of any Presidential intervention in the final disposition of the cases and the absence of any evidence of any Presidential intervention as a quid pro quo for value, no assertions of Presidential misconduct should be sustained.

B. Neither the Testimony of Richard G. Kleindienst Nor John N. Mitchell Before the Senate Judiciary Committee Constitutes a Basis for Concluding That the President Was Under Some Legal Duty To Respond to That Testimony

From the time of the printing of The *Washington Post* on February 29, 1972, until near July 17, 1972, the White House was concerned with the realization that the President and his administration were the focus of an intense scrutiny as to activities surrounding the settlement of the ITT antitrust cases. Charles Colson, in testimony on June 14, 1973, before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, testified to the White House interest in the matter as follows:

Pickle. Was Mr. Dean working on the case at the same time?
Colson. Several of us were; yes, sir.
Pickle. Several of you, it was a major project at the time, was it?
Colson. It was a major controversy at the time (p. 204 subcommittee hearings).

Shortly thereafter, he continued:

Colson. We were trying at that point in time to determine whether or not that was, in fact, an authentic memorandum. If you will recall the circumstances at that time the entire thrust of the case that was being built against Mr. Kleindienst, the entire thrust of the case in controversy in the Senate Judiciary Committee turned on the language of that memorandum. The question of whether or not that was, in fact, an authentic memorandum. The question of whether the facts presented in that memorandum were facts or were not facts were very central to the question of whether Mr. Kleindienst would be confirmed. Those were very serious accusations ostensibly made in Mrs. Beard's memorandum. (Presidential Presentation, book II, tab 13a.)

The preoccupation of top aides such as Ehrlichman, Colson [12] and Dean, along with the White House press aides, with the settlement aspect of the ITT episode is explainable by reference to the language of the first paragraph of Jack Anderson's February 29, 1972, article:

We now have evidence that the settlement of the Nixon's administration's biggest antitrust case was privately arranged between Attorney General John Mitchell and the top lobbyist for the company involved. (Special staff presentation, book V, vol. 2, tab 34.1.)

In order to place the actions of the White House staff and the President in the first half of 1972 in proper perspective, it must be recognized that in the days immediately following the disclosure of the Dita Beard memorandum, Peter M. Flanigan, a top White House aide, then Executive Director of the Council on Economic Policy, received much attention from the Senate Judiciary Committee, the news media, and the White House staff because of his tangential participation, as described, in one phase of the activity which eventually culminated in the settlement of the ITT cases. At that time, the news media's curiosity was pitched to a possible Kleindienst-Flanigan testi-

[12] See also Colson HJC 4338–4339.

monial contradiction in reference to Kleindienst's White House contacts as illustrated by the following two excerpts from newspaper articles contained in book V, volume 3, tab 52 of the committee staff's presentation materials:

> The questioning of Kleindienst today, limited to a maximum of 6½ hours by the committee's 5 p.m. deadline for a report to the floor, is expected to focus on the disclosure by White House aide Peter M. Flanigan in a letter Monday in which he said he had several conversations with Kleindienst last year about a settlement of antitrust cases against the International Telephone & Telegraph Corp.
>
> Flanigan, who gave limited testimony before the committee last week, said in the letter that he passed along ITT's complaints about a proposed settlement to the then Deputy Attorney General and also informed him when an outside consultant had completed his financial analysis of ITT's arguments.
>
> Kleindienst, testifying last month, said he did not recall discussing the ITT matter at the White House, but suggested there might have been "casual reference" to it in other conversations there. (*The Washington Post*, Apr. 27, 1972.)

Again:

> Kleindienst testified that he had "no recollection" of being told by Flanigan last April that ITT was displeased with the Justice Department's original antitrust settlement offer and the next month that the White House aide had received a financial analysis concerning the cases which had been recruited through Flanigan from a New York investment banker.
>
> Flanigan, who answered a limited number of questions put by the committee last week, told of those conversations with Kleindienst in a letter he sent to Eastland on Monday.
>
> In light of Flanigan's letter, Kleindienst conceded, it was "extremely probable" that he did have the contacts described. (*The Washington Post*, Apr. 28, 1972.)

The testimony of Charles W. Colson before the House Committee on the Judiciary on July 15 and 16, 1974, is also instructive. He testified that he, not only as a member of the special task force, but as its overseer (Colson HJC 4366–4367), had followed the course of the Kleindienst hearings to assess its political impact, rather than for exact content. (Colson HJC 4339–4340, 4369.) Although he generally kept the President informed of the political give and take or "punch and counter-punch" that occurred, Colson did not recall telling the President what Kleindienst and Mitchell were actually testifying to though Flanigan's testimony was covered. (Colson HJC 4340.) Colson testified he met with the President and Haldeman, probably, on March 24, 1972, at which time the President inquired of Haldeman what he, the President, might previously have said to Kleindienst about the case or antitrust policy. When Haldeman told him any exchange was limited to policy matters, the President said, "Thank God I didn't discuss the case." (Colson HJC 4341–42.) The transcript of a June 4, 1972, meeting with Mitchell, the President and Haldeman, although replete with references to the ITT matter, is devoid of any remarks relating to Mitchell's or Kleindienst's testimony before the Senate Judiciary Committee. (Presidential Presentation, book II, tab 12a.)

The essential point to be grasped by references to the settlement and newspaper excerpts and the Colson testimony is that any input to the President, whether by White House aides or outside sources, was permeated by the controversies of those times. Along with that, it would be well to remember that no evidence has been produced to warrant a reasonable assumption that more than a handful of advisors knew of

the President's call to Kleindienst or of his conference with Mitchell 2 days thereafter.[13] Because of the foregoing, the flow of condensed news to the President would not have, except by happenstance, been geared at Kleindienst's statements in which he stated he could not recollect why the Department of Justice sought an appeal extension in the pending case of *U.S.* v. *ITT* (Grinnell) (Kleindienst 2 KCH 204). That event, unrelated to the settlement, was cast as insignificant by those concerned with the heat of the day; purely legal history, having occurred 3 months before the settlement and then forgotten for all practical purposes.

Mr. Kleindienst, in an October 31, 1973, statement, reprinted in full at tab 51.2 of volume 3, book V of the special staff's presentation materials, stated that his testimony before the Senate Judiciary Committee was focused, solely, on the negotiations and settlement of the ITT antitrust litigation and Flanigan issues. Mitchell's testimony certainly could be construed as consistent with his conversation with the President of April 21, 1971, in which he voiced political and general policy considerations to the President without discussing the merits of the cases. *The Washington Post* of March 10, 1972, while bannering the headline "No Nixon Role in ITT Case, Mitchell Says" (Special staff presentation, book V, vol. 3, tab 52.2), explicitly made it clear in paragraphs 1 and 6 of that story, that the former Attorney General's remarks related to his denial of any Presidential intervention in the *settlement* of the case.

Finally, and not without weight, is the fact that Kleindienst, on May 17, 1974, pled guilty, with the concurrence of the Special Prosecutor, *not to perjury*, but to a misdemeanor—namely—one count of "refusing or failing fully to respond to questions propounded to him by the Senate Committee on the Judiciary on March 2, 3, 7, and 8, and April 27, 1972."[14]

[13] Colson, for example, did not know of the April 19, 1971, telephone call, until near the end of March 1972. (Colson HJC 4343.) Although it would have been thought highly improbable at one time, Ehrlichman and Colson were unaware of the White House tape recording system, although Haldeman knew of its existence.

[14] Mr. Mitchell has not been formally accused of any perjury associated with testimony during the Kleindienst confirmation hearings. He was acquitted, recently of an unrelated perjury charge in New York City.

IV. DAIRY

A. The President Did Not Impose the Import Quotas Sought by the Dairy Industry Nor Were His Actions Influenced by Campaign Contributions or Pledges of Contributions

The dairy industry, like many components of the farm economy is the beneficiary of Government price support programs legislated by the Congress. With decisions frequently being made within the executive branch on the administration of critical dairy programs and with dairy legislation constantly under review in the Congress, the dairy farmers have organized into an influential political force in recent years. There are now three major dairy cooperatives in the United States: The Associated Milk Producers, Inc., (AMPI), Mid-America Dairies (Mid-Am) and Dairymen, Inc. (DI).

These dairy organizations not only represent in Washington the interests of their members, they also exert influence through the ballot box and through political contributions. Their activities are not unlike the fund raising and contributing activities of special interest groups such as the Committee on Political Education (COPE) of the AFL–CIO.

The President's first contact with members of the dairy organizations was in 1970 when officials of AMPI invited him to speak at their annual convention. Although the President declined the invitation, in a gesture of courtesy, he invited members of the organization to meet with him in Washington and to arrange a meeting of a larger delegation of dairy leaders at a later date. (Presidential Presentation, vol. III, tabs 1a, 1b, 1c.) Harold Nelson, general manager of AMPI, and his special assistant David Parr accepted the invitation and paid a courtesy call on the President on September 9, 1970. This meeting was a part of a Presidential "Open Hour," lasted less than 10 minutes and was devoted to introductions, photographs, and a distribution of Presidential souvenirs.

There is absolutely no evidence which indicates or even suggests that campaign contributions were discussed at any time during this brief exchange. The President did not see a memorandum referring to a campaign pledge by the organization Nelson and Parr represented. Charles Colson did not discuss that or any other contribution or pledge from the dairymen with the President nor was it discussed in the meeting. (Colson HJC 4386, 4387.) Neither is there any evidence that the memorandum or any pledge by the dairymen were discussed or mentioned to the President by anyone.

As Secretary of Agriculture Hardin's request, the President on May 13, 1970, directed the Tariff Commission to investigate and report on the necessity for import controls on four new dairy products which had been developed to evade import controls previously estab-

lished on recognized articles of commerce. (Presidential Presentation, vol. III, tabs 4a, 5a.) After an investigation had been conducted, the Tariff Commission, a body of impartial experts, issued a report in which it unanimously agreed that imports of the four products were interfering with the dairy program.

Therefore the Commission recommended zero quotas for three of the items and an annual quota of 100,000 pounds for the fourth. (Presidential Presentation, vol. III, tab 4b.) On October 19, 1970, Secretary Hardin recommended that the Tariff Commission's recommendations be implemented. (Presidential Presentation, vol. III, tab 5a.) Secretary Hardin on November 30, 1970, in a memorandum to Bryce N. Harlow, Assistant to the President, again pushed for a zero quota on one of the items. (Presidential Presentation, vol. III, tab 5c.)

Subsequently, on December 16, 1970, Patrick J. Hillings of the law firm of Reeves & Harrison, Washington, D.C., gave Roger Johnson, Special Assistant to the President, a letter addressed to the President requesting that the Tariff Commission's recommendations be adopted. The letter referred to contributions to Republican candidates in the 1970 congressional election and to plans to contribute $2 million to the reelection compaign. Mr. Johnson referred to the matter to H. R. Haldeman, White House Chief of Staff. John Brown, the Staff Secretary, referred it to "J. C.," who was to check with "E+Colson" regarding whether the letter should be sent to the President. (Presidential Presentation, vol. III, tab 6a; special staff presentation, book VI, vol. 1, tab 12.1.)

Charles Colson then obtained the letter and kept it in his safe. (Presidential Presentation, vol. III, tabs 6b, 6c; special staff presentation, book VI, vol. 3, tab 32.3.) This statement is fully supported by the testimony of Charles Colson who testified that the letter bounced around Bob Haldeman's staff system for a few days and then came to him, with a cover message from Larry Higby, an assistant to Mr. Haldeman, saying "What shall we do with the attached?" (Colson HJC 4322.) When Colson received the letter it had not gone to the President. (Colson HJC 4322.) Colson testified that upon reading it he "hit the roof," called in Hillings, "chewed him out" and told him to withdraw the letter or it would be turned over to the Department of Justice. Hillings agreed to withdraw it. Colson kept the original and gave it to John Dean, Counsel to the President, when documents were being assembled for the *Nader* v. *Butz* suit. (Colson HJC 4322–4324.) The suit was filed on January 24, 1972.

This testimony of Mr. Colson is fully corroborated by both Hillings and Chotiner. Hillings in fact stated that he had neither expected nor intended that the President see the letter in the first place. (Presidential Presentation, vol. III, tabs 6b, 6c; special staff presentation, book VI, vol. 3, tab 32.3.)

There are no notations or markings on the letter or any evidence that the President ever saw it. Neither is there any evidence that its contents were ever discussed with the President.

After reviewing the recommendations of the Tariff Commission, the Secretary of Agriculture and the Task Force on Agriculture Trade of the Counsel of Economic Advisers, the President, on December 31, 1970, by proclamation No. 4026 ultimately established quotas totaling

in excess of 25 million pounds for three of the products and in excess of 400,000 gallons for the fourth. (Presidential Presentation, vol. III, tab 7a, Colson HJC 4379, 4380.) Despite a report that any modification of the Tariff Commission's recommendation would be viewed by the dairy people as a "slap in the face." (Presidential Presentation, vol. III, tab 7b) the President rejected the zero quota system recommended by the Commission and sought by the dairy organizations. Instead the President took an action which in his view would halt the evasion of existing import quotas without imposing a zero quota restraint on foreign dairy products.

B. The Milk Price Support Level for 1971–72, Was Increased Due to Economic Factors and Congressional Pressure, Not in Return for a Pledge of Campaign Contributions

Each year the Secretary of Agriculture announces the price at which the Government will support milk prices for the following year. In 1970, Secretary Hardin had announced that for the marketing year running from April 1, 1970, through March 31, 1971, the Government would support manufacturing milk at $4.66 per 100 pounds, 85 percent of parity. This figure represented an increase of 2 percent of the parity rate over the year before (1969–70). As the 1971–72 marketing season approached, inflation had caused the parity level to drop. The question within the Government was whether to continue supporting the milk price at $4.66 per 100 pounds or to raise the price in order to maintain parity at the previous year's level.

During late 1970 and early 1971 the dairy industry actively sought congressional support and action in its effort to obtain an increase in the milk price support level. (Presidential Presentation, vol. III, tab 8a; special staff presentation, book VI, vol. 2, tab 19.2.) In February and March of 1971 approximately 100 Senators and Congressmen wrote the Secretary of Agriculture to urge that the support price be increased. Most of these Congressmen recommended that the price support be raised to 90 percent of parity. Some requested that the price support be raised to at least 85 percent of parity. (Letters and telegrams to the Secretary of Agriculture transmitted by the White House to the House Judiciary Committee and noted at special staff presentation, book VI, vol. 2, tab 19.)

Some of the letters openly referred to the fact that spokesmen for the dairy cooperatives had written or called upon the Congressmen to ask for support and a number of letters were apparently drafted by these various lobbying groups.

At the same time, many Congressmen took to the floor of the House and Senate to express their concern over the low price support. On March 1, Congressman Robert W. Kastenmeier, Democrat of Wisconsin, rose to tell his colleagues: "We need your assistance in persuading the administration to raise dairy price supports to 90 percent of parity * * *" 117 Congressional Record 4310 (1971). His sentiments were echoed by Congressman Les Aspin, Democrat of Wisconsin, 117 Congressional Record 4311 (1971), and Congressman Vernon Thompson, Republican of Wisconsin, 117 Congressional Record 4280 (1971).

Again on March 8, Congressman William Steiger, Republican of Wisconsin entered into the Congressional Record a letter he had sent to Secretary Hardin calling for 90 percent parity, 117 Congressional Record 5400 (1971), and on March 9, Senator Vance Hartke, Democrat of Indiana, called for at least 85 percent support and hopefully substantially higher, 117 Congressional Record 5518, 5537 (1971). Congressman Robert McClory, Republican of Illinois, likewise called for a price increase, 117 Congressional Record 5678 (1971).

On March 10, Congressman Ed Jones, Democrat of Tennessee, argued that even 90 percent would not be a "decent return, but it would help." Congressman Jones urged the Department of Agriculture not to "sit idly by and watch our dairy industry decline into oblivion. Unless dairy price supports are set at a level high enough to guarantee 90 percent of parity, that is exactly what we are inviting," 117 Congressional Record 5956–57 (1971). Senator Mondale also called for the 90 percent level on that date, 117 Congressional Record 5793 (1971).

On March 17, Congressman David Obey, Democrat of Wisconsin, called for an increase to 90 percent, 117 Congressional Record 6910 (1971), and on March 19, Senator Harold Hughes, Democrat of Iowa, called for the passage of a bill to set parity at least 85 percent, 117 Congressional Record 7223 (1971). The sole opposition voiced to an increase in price was by Congressman Paul Findley, Republican of Illinois, 117 Congressional Record 6870 (1971).

While their colleagues were marshaling support in open floor speeches, senior Democratic leaders in the Congress were expressing their concerns privately to representatives of the administration. On February 10, the chairman of the House Ways and Means Committee, Wilbur Mills (Democrat, Arkansas), arranged a meeting in the office of Speaker Carl Albert (Democrat, Oklahoma) to discuss the dairy issue. Representatives of the dairy industry had apparently asked for the meeting to plead their case. In attendance were Congressmen Mills and Albert, Congressman John Byrnes (Republican, Wisconsin), William Galbraith, head of congressional liaison for the Department of Agriculture; Clark MacGregor, then Counsel to the President for Congressional Relations; and Harold Nelson and David Parr from AMPI. (Special staff presentation, book VI, vol. 2, tab 19.)

Congressional leaders continued to make their views known in several private conversations thereafter. Congressman Mills urged Clark MacGregor on at least six occasions in late February and early March to urge the President to raise the support price, a fact which MacGregor relayed to John Ehrlichman, Assistant to the President for Domestic Affairs, and George Shultz, Director of the Office of Management and Budget (Presidential Presentation, vol. III, tab 9a, special staff presentation, book VI, vol. 2, tab 19.6.) Congressman Mills and Speaker Albert also telephoned George Shultz with the same request. Mr. Shultz sent a memorandum to John Ehrlichman at the White House indicating the substance of the Mills request for a rise in the support level. (Presidential Presentation, vol. 2, tabs 19, 19.1, 19.3, 19.4.)

On March 12, 1971, Secretary Hardin announced that the support level would not be raised for the 1971–72 marketing year. (Special staff presentation, book VI, vol. 2, tab 21.2.) Intense lobbying began. On March 16, 1971, Richard T. Burress, Deputy Assistant to the President, reported to John Ehrlichman that the decision has been hit by partisan attacks, that legislation mandating an increase would have the support of the Speaker and Congressman Mills, and that Congressman Page Belcher (Republican, Oklahoma) was mounting opposition which the White House should support. Presidential Presentation, vol. III, tab 10a.)

Despite administration efforts, however, the milk producers' congressional lobbying efforts made progress. In the House, 28 separate bills with 29 Republicans and 96 Democrat sponsors were introduced between March 16 and March 25 to set the support price at a minimum of 85 percent and a maximum of 90 percent of parity. In the Senate, Democratic Senator Gaylord Nelson of Wisconsin, introduced legislation on March 16, 1971, that would have required support levels at a minimum of 85 percent of parity. Of the bill's 28 sponsors, 1 was a Republican and 28 were Democrats. Three days later, Senator Hubert Humphrey sponsored his own bill seeking a higher parity. (Presidential Presentation, vol. III, tab 11a.)

On March 19, 1971, John Whitaker reported to John Ehrlichman that contrary to a previous vote count, Secretary Hardin was convinced there is a 90-percent chance that an 85 percent of parity support bill will be passed by the Congress and that the President should allow himself to be won over to an increase to 85 percent of parity. (Presidential Presentation, vol. III, tab, 12a, special staff presentation, book VI, vol. 2, tab 24.3.)

As the President was subsequently advised, John Ehrlichman, George Shultz, Don Rice, Henry Cashen and John Whitaker met on March 19 with Secretary Hardin and Under Secretary Phil Campbell regarding the entire problem. Their recommendation to the President concerning the scheduled March 23 meeting with dairy leaders was to listen to their arguments and then wait to see if the Democrats could move the bill. Their recommendation was conveyed to the President in a briefing memorandum from John Whitaker concerning the March 23 meeting with dairy leaders. This memo recapitulated the March 12 price support announcement, the status of pending legislation, and briefly noted that the dairy lobby—like organized labor—had decided to spend political money. This memo discussed in much more detail the pressure which was coming from the Congress for higher supports; that the Congress was acting at Speaker Albert's instigation; and that a bill for higher supports would probably be passed, thus presenting the President with a very difficult veto situation. (Special staff presentation, book VI, vol. 2, tab 27.1.)

On March 23, 1971, the morning of the dairy meeting, the President called Secretary of the Treasury Connally. (Presidential Presentation, vol. III, tab 13b, special staff presentation, book VI, vol. 2, tab 28.2.) This is confirmed by Secretary Connally's log (Presidential Presentation, vol. III, tab 13a; special staff presentation, book VI, vol. 2, tab 28.3), and thus a memorandum for record to the effect that Connally called the President (special staff presentation, book VI, vol. 2, tab 28.4) is incorrect. The primary subject of their brief conversation was an unrelated legislative matter. During the latter part of their conversation, the discussion touched on the fact that the President would be meeting later that morning with a group of dairymen and the potential effect of a support level increase on consumer prices. (Tape recording of the President's statement during telephone conversation between the President and Secretary John Connally, Mar. 23, 1971.) While the Secretary's side of the conversation was not recorded, it was later reported in a memorandum for the record that Secretary Connally had suggested that the President announce

in the meeting that the level would be raised to 85 percent of parity. (Special staff presentation, book VI, vol. 2, tab 28.4.)

Any suggestion that Secretary Connally contacted the President by telephone on March 20 or March 23, 1971, to convey offers of campaign contributions from the milk producers is clearly erroneous for the logs of both the President and the Secretary show that it was the President who contacted Secretary Connally to discuss various issues and not the reverse. Moreover, the taped conversation confirms the fact that the President did not discuss campaign contributions with the Secretary.

Similarly it has been erroneously suggested by some that Secretary Connally subsequent to March 23, 1971, sought campaign contributions from the dairy producers as a condition precedent to the higher price support. Such an assertion is entirely incorrect and is wholly refuted by the fact that the Secretary advised the President prior to the March 23 meeting to announce the increased price support at that time. (Special staff presentation, book VI, vol. 2, tab 28.4.)

On the morning of March 23, 1971, the President met with 18 dairy representatives in the Cabinet room of the White House. The meeting was also attended by numerous Government officials, including OMB Director George Shultz, Associate Director of OMB Donald Rice, Assistant to the President John Ehrlichman and Deputy Assistants to the President Henry Cashen and John Whitaker. Representing the Department of Agriculture were Secretary Harding, Under Secretary Phil Campbell, Assistant Secretaries Clarence Palmby and Richard Lyng, and Deputy Secretary William Galbraith. (Special staff presentation, book VI, vol. 2, tab 29.2.)

Contrary to various allegations, the meeting had been planned and scheduled some months in advance. The President originally invited the dairy leaders over 6 months earlier, during a courtesy telephone call on September 4, 1970, and a courtesy meeting on September 9, 1971. (Presidential Presentation, vol. II, tab 14a, 14b.) Specific arrangements began in mid-January 1971. The Department of Agriculture obtained a list of the officers and representatives of the major dairy industry groups which was forwarded to the White House by Secretary Hardin on January 26, 1971, with his recommendation that a meeting be scheduled. (Presidential Presentation, vol. III, tab 14a.) On February 25, 1971, Secretary Hardin was informed that the President had approved the meeting and that it had been set for 10:30 a.m., March 23, 1971. (Presidential Presentation, vol. III, tab 14c.) Thus this meeting was planned and a specific time, date, and guest list established at least 1 month prior to the meeting date, and wholly independent of the 1971 price support announcements.

The President opened the meeting by thanking the dairy leaders for their nonpartisan support of administration policies. In this meeting, the general problems of the dairy industry were discussed, and in particular the immediate need for higher price supports. No conclusions were reached about the support price, and campaign contributions were not mentioned. (Tape recording of meeting among the President and dairy representatives, March 23, 1971.)

With increased pressure from Capitol Hill and following the discussion with the dairymen, the President met, during the afternoon

of March 23, with seven senior administration officials to explore the situation: Secretary John Connally; Secretary Clifford Hardin; Under Secretary of Agriculture Phil Campbell; George Shultz, Director of the Office of Management and Budget; John Ehrlichman, Assistant to the President for Domestic Affairs; John Whitaker, Deputy Assistant to the President for Domestic Affairs; and Donald Rice, Associate Director of the Office of Management and Budget.

The meeting opened with Secretary Connally—at the President's request—outlining the situation. He pointed out first that, politically, the President was going to have to be strong in rural America and that the farmers had many problems and that this was one of the few which the President could do anything about; second, that the major groups represented some 100,000 dairymen who were being tapped, labor union style, to amass an enormous amount of money which they were going to use in various congressional and senatorial races all over the country to the President's political detriment. Secretary Connally also advised the President twice that he believed a support level increase to be economically sound.

The discussion then centered on the pending legislation which would require a support level increase. The President stated that he believed such a bill would pass. Secretary Hardin expressed the view that a bill forcing an increase was almost certain to pass and told the President that 150 names were on the bill and that Speaker Carl Albert supported it. Secretary Connally stated that Wilbur Mills also supported it and that it would pass the House beyond any question. Secretary Connally said the move would gain liberal support as it would embarrass the President.

A veto was then discussed and ruled out with Secretary Hardin emphasizing that the President would have no alternative but to sign the bill. In addition, Secretary Connally stated that on Capitol Hill, the dairymen were arguing that a veto would cost the Republicans the States of Missouri, Wisconsin, South Dakota, Ohio, Kentucky, and Iowa in the 1972 election.

The President then concluded that Congress would pass a bill for higher support levels and that he could not veto it. However, to limit the extent of the price increase and deter any future request by the dairy industry, the President accepted a proposal by Secretary Connally that a promise be sought from the dairymen that they would not seek any further increase in 1972.

Following this decision, it was suggested that the administration take credit for the increase and at the same time obtain, in return, the support of Speaker Albert and Congressman Wilbur Mills on other pending legislation. The problem of keeping the decision quiet until Congressmen Albert and Mills could be approached but still obtain the promise from the dairymen not to request an increase in 1972, was then discussed and settled.

At the end of the meeting, John Ehrlichman mentioned contacting Charles Colson and Bob Dole, and the President outlined who was to contact Speaker Albert and Congressman Mills and that he understood Phil Campbell would contact the dairymen about not seeking an increase in 1972. Six facts thus become clear: (1) the announcement of the decision was to be timed in order that a compromise might be

worked out with Speaker Albert and Congressman Mills, not an attempt to obtain compaign contributions; (2) the President's understanding of the plan was that Phil Campbell, not Charles Colson, was to contact the dairymen about obtaining a pledge not to seek an increase in 1972, not a pledge of campaign contributions; (3) only a vague and passing reference was made regarding Charles Colson which did not include any statement of why Colson would be contacted or what, if anything, his role would be; (4) the President's chief advisers including agricultural expert, Secretary of Agriculture Hardin, recommended and fully concurred in the decision; (5) based on unanimous advice, the President firmly concluded that the mandatory bill would pass and that for political reasons he could not veto it; and (6) contributions to the President's campaign were not mentioned at all. Thus, it is clear, that the President did not raise the milk price support level in 1971 as a result of any suggestion or promise of campaign contributions from the dairy industry.

Moreover, subsequent events clearly demonstrate that the support level was not raised due to a promise of campaign donations. Phil Campbell testified in executive session before the Senate select committee that he did, in fact, call Harold Nelson after the meeting and asked him whether the dairymen would refrain from asking for further increases if the administration raised the support level. Mr. Nelson agreed. Campbell did not tell him of the meeting with the President or discuss any other matter with Mr. Nelson. Nor did he suggest that Nelson not boycott a Republican fundraising dinner. (Presidential Presentation, vol. III, tab 21a, special staff presentation, book VI, vol. 3, tab 32.5.)

Similarly, following the meeting of March 23, 1971, the President had no contact with John Ehrlichman at any time prior to a meeting between Ehrlichman and Charles Colson later that day. (Special staff presentation, book VI, vol. 3, tab 32.2; Colson HCJ 4333, 4334.) Nor did the President meet or speak with Charles Colson during that time. (Special staff presentation, book VI, vol. 3, tab 30.3, 32.3.) The President's telephone conversation with Charles Colson on that date was prior to the afternoon meeting. In any event, Colson testified that the President never discussed with him a $2 million commitment from the dairymen or any campaign contributions relative to the 1972 campaign. (Colson HJC 4382, 4387.)

Charles Colson testified that he didn't know whether or not Ehrlichman told him in their meeting on the afternoon of March 23 that the support level decision was going to be reversed. In any event, Colson did testify that he did not mention that fact to Chotiner in a subsequent meeting that day. Colson further testified that he undoubtedly told Chotiner, as he had previously, that the dairymen should live up to their commitments regardless of administration policies. (Colson HJC 4332–34, 4383.) Colson's conversation with Chotiner dealt with dinner tickets, not with campaign contributions or pledges. (Colson HJC 4381, 4382.) In addition, Colson testified that at no time in his discussions with representatives of AMPI, which also includes Chotiner, did he ever indicate that there was a quid pro quo. (Colson HJC 4384, 4385.) In fact, Colson stated that the actions of AMPI's representatives had a negative rather than favorable effect. (Colson HJC

4377.) Colson's action were consistent with an earlier instruction from Haldeman telling Colson to be sure the dairymen didn't expect anything in return. (Colson HJC 4317.)

In this regard, it is interesting to note that the memoranda regarding the Senate staff interviews with Murray Chotiner curiously do not mention whether Mr. Chotiner was asked the seemingly obvious question of whether Colson, Ehrlichman, or anyone had told him that campaign pledges and/or contributions were to be obtained from the dairymen as a quid pro quo for a support increase. Rather, Chotiner is reported to have said that at an earlier point Colson told David Parr that there could not be a quid pro quo. (Special staff presentation, book VI, vol. 3, tabs 32.3 and 34.3.) Colson's testimony corroborates this. (Colson HJC 4316.)

Herbert Kalmbach testified that at a meeting on the night of March 24, 1971, Harold Nelson of AMPI reaffirmed a campaign pledge. (Kalmbach HJC 4763.) Kalmbach testified that he was unaware of a pending announcement regarding price supports and thus gave Chotiner and Nelson no information regarding price supports and made no promises or predictions of any kind respecting price supports in the meeting. Nothing was said as to whether anything was to happen if the decision was not changed. (Kalmbach HJC 4907–4910.) This is consistent with Mr. Kalmbach's testimony before the Senate select committee that he had no understanding with Haldeman, Ehrlichman, Nelson, Chotiner, or anyone that the reaffirmation was being made in any way as a condition of the announcement of the price increases. (SSC, draft of final report, pt. 2, pp. 470, 471.)

On this same point, Mr. Chotiner has stated in sworn testimony that he did not know of the decision to increase support levels until it was publicly announced, that he did not discuss campaign contributions in seeking a support level increase on behalf of the dairymen and that he did not talk to the dairymen in the context of contributions in return for favorable action. (Presidential Presentation, vol. III, tab 22a, special staff presentation, book VI, vol. 3, tab 34.3.) The Senate select committee and other testimony of Harold Nelson, the third participant in the March 24 meeting, also contradicts any misinterpretation of Kalmbach's testimony suggesting that the reaffirmation was to have, or did have, any effect on the decision to increase the support level. (Presidential Presentation, vol. III, tab 23c; special staff presentation, book VI, vol. 3, tab 34.2.) This misconstruction is also contradicted by the sworn testimony of David Parr and Marion Harrison (Presidential Presentation, vol. III, tabs 23d, 23e). Indeed, while Mr. Kalmbach testified that he reported the reaffirmation to Mr. Ehrlichman at noon the next day, there is no evidence that this fact was communicated to the Department of Agriculture before its announcement of the increase.

It is noteworthy that the Senate select committee has offered an explanation for the dairymen's fundraising activities between March 23 and 25, 1971. Based on the testimony of Harold Nelson of AMPI, the Senate select committee posits that Nelson had learned of the pending announcement of a support level increase and that Nelson hoped to induce commitments from other dairy leaders by telling them that the increase was only possible rather than definite. (SSC, draft of final

report, pt. 2, p. 456.) In any event, neither the President nor any member of his administration or his reelection effort sought or accepted a campaign contribution or pledge in return for any Presidential action favorable or unfavorable.

Finally, there are a few considerations that should be mentioned to complete the record. First, Secretary of Agriculture, Clifford M. Hardin, changed his decision regarding the milk price support level as a result of economic factors and traditional political considerations. In a sworn deposition Secretary Hardin pointed out that some of the purposes of the support program are, among others, to assure adequate supplies of milk and dairy products; encourage development of efficient production units and stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment when compared with the things that farmers buy. He also stated that increased costs and other economic factors raised by dairymen, the political pressure which precluded a veto of a bill which would set parity at a minimum of 85 percent and possibly as high as 90 percent, the potential threat of production controls which would decrease the milk supply, and the need for an increased supply of cheese were additional factors that caused him to reevaluate and then change his earlier decision, and that the change was based entirely on a reconsideration of the evidence on the basis of the statutory criteria. (Presidential Presentation, vol. III, tab 24a, special staff presentation, book VI, vol. 3, tab 35.3.)

In this regard, the Commodity Credit Corporation Docket MCP 98a, amendment 1, which implements the Secretary's decision, states that the change was based on a reevaluation of the dairy situation, giving full recognition to increasing labor, waste disposal, and other costs on dairy farms and to increasing demand for cheese. On April 15, 1971, the General Counsel of the Department of Agriculture approved for legal sufficiency the dockets authorization and advised the board of directors of the Commodity Credit Corporation that the determination of the support level necessary to meet the statutory criteria was solely within the discretion of the Secretary. On May 12, 1971, the amendment raising the support level to 85 percent of parity was approved by the board of directors. (Presidential Presentation, vol. III, tab 24b.)

Second, when Mr. Kalmbach was asked by the dairymen in 1972 to intercede on their behalf regarding antitrust suits by the Justice Department, he, as associate finance chairman, refused, abrogated their outstanding commitment and advised them that their funds were not wanted. (Kalmbach HJC 4777, 4911.) Mr. Kalmbach advised Mr. Ehrlichman of this fact and Mr. Ehrlichman indicated he felt it was a good judgment. (Kalmbach HJC 4911.) Those antitrust suits are still proceeding in the courts.

Third, any suggestion that contributions by the dairy industry in early 1971 represented "early money" for the 1972 Presidential campaign is totally without merit. (Special staff presentation, book VI, vol. 2, tab 16.) The fact is that the President's campaign received no contributions from the dairymen throughout the first half of 1971, the entire period contemporaneous with the milk price support decisions. It is true that contributions during that period were made to committees associated with the Republican National Committee but not to the

President's campaign. (Special staff presentation, book VI, vol. 2, tab 26, vol. 3, tab 33; SSC draft of final report, pt. 2, pp, 244, 245, 423, 457, 458.) This fact is reaffirmed by the conclusion of the Senate select committee that there is no evidence of any transfer of funds from any RNC committee to the President's reelection organizations in 1971. Specifically with regard to contributions by one of the dairy trusts, ADEPT, the Senate committee concluded that there is no evidence that any portion of the money benefited the President's reelection campaign. (SSC draft of final report, pt. 2, pp. 422, 527.)

In the mass of information presented to this committee there is not a scintilla of evidence to demonstrate that any action was taken by the President because of any campaign contributions or pledges of contributions made by the dairymen to the President's reelection campaign. Nor is there any testimony by anyone that administration or reelection officials sought or accepted contributions or pledges in return for any official act. To the contrary, when a dairymen's representative implied such an overture, one administration official went so far as to consider referral of the suggestion to the Department of Justice. The President's only action having favorable consequences for the dairymen was set forth in the tape of the afternoon meeting of March 23, 1971. That tape proves (1) that contributions or pledges to the President's reelection campaign were not discussed nor were they a condition of any Presidential action, (2) that the President did not direct or approve the contacting of Charles Colson or any other person for the purpose of seeking or obtaining any contributions or pledges and (3) that the President was advised and specifically concluded, as he has stated, that Congress would pass a mandatory increase and that for political reasons he could not veto it. To consider the President's decision in raising price supports improper because campaign contributions were subsequently made by various entities affected by the decision would require the President and all other elected officials who may ever run for reelection to either forgo contributions or abstain from making decisions that are the constitutional and statutory responsibilities of their office.

V. IRS

A. There Has Been No Evidence Presented That the President Misused the Internal Revenue Service

All of the materials dealing with the alleged misuse of the Internal Revenue Service by this administration emphasize the one fundamental point that the Internal Revenue Service (IRS) was not, in fact, misused. The various materials, testimony, and reports of the House Committee on the Judiciary, Senate Select Committee on Presidential Campaign Activities, and the Joint Committee on Internal Revenue Taxation demonstrate and affirm this fact. The evidence consists of memos that claim that someone at the White House asked someone at the IRS to do something that might harass some individual or organization. Nevertheless, the overriding fact remains that these suggestions were not carried out.

On December 20, 1973, the Joint Committee on Internal Revenue Taxation's staff issued a report, *Investigation Into Certain Charges of the Use of the Internal Revenue Service for Political Purposes*, 93d Congress, 1st Sess. (Dec. 20, 1973) (hereinafter cited JCR followed by a page number). That committee investigation was based on charges made by Mr. John Dean during the public hearings of the Senate Select Committee on Presidential Campaign Activities in late June of 1973. According to the joint committee's report:

> He [Mr. Dean] made several allegations that individuals in the White House *attempted* to use the Internal Revenue Service for partisan political purposes. Dean alleged that he was asked to stimulate audits on several "political opponents" of the White House and to "do something" about audits that were being performed on friends of President Nixon *who felt that they were being* harassed by the IRS. In addition, Dean revealed the existence of a special group within the Internal Revenue Service to collect information about extremist individuals and organizations. Since Dean's testimony, there have been several newspaper articles making similar accusations about the IRS. (JCR 1) [emphasis added].

There are two key points to be emphasized in Mr. Dean's basic allegations. First, it is claimed that several individuals in the White House *attempted* to misuse the IRS for partisan political purposes. It is clear that such an alleged misuse could only succeed if it were supported by the power and authority of the President. On looking at all the evidence available, it is clear that the President took no action to accomplish this objective.

One of the President's most basic functions in relation to the IRS is the appointment of the Commissioner of Internal Revenue, and his superior, the Secretary of the Treasury. During his time in office President Nixon appointed three highly principled [15] Commissioners of the highest integrity and capability. No one, in all the hearings, allega-

[15] A characterization in an article critical of the White House relationship with the IRS. Bob Kuttner, "The Taxing Trials of I.R.S.," *The New York Times Magazine*, Jan. 6, 1974, at p. 64.

tions, or even newspaper leaks has ever suggested anything to the contrary. The Commissioners were all men of stature and independence. Under these Presidential appointments the record of the IRS for fair, nonpartisan enforcement of the tax laws was exemplary. The records of the administration's four Secretaries of the Treasury in relation to their responsibilities is equally commendable. Thus, the record reveals a President who has appointed independent Commissioners of Internal Revenue and who has in no way prevented them from resisting any improper political pressure. Concerning the allegation of IRS misuse, the ultimate fact is that the President's appointees did, in fact, resist any improper suggestions for the use or misuse of the agency.

The staff report of the Joint Committee on Internal Revenue Taxation, in going beyond the evidence of memos and allegations, tells an important story. When Dean turned over his enemies list to Commissioner Johnnie Walters of the IRS on September 11, 1972 (JCR 3), 4 days before Dean's meeting with the President on September 15, 1972, Dean asserted "it [the request] doesn't come from the President." (Dean HJC 3697.) Most importantly, Dean's request did not result in any political harassment of the individuals on the list. As the report put it:

> The staff's investigation paid particular attention to the cases of those individuals mentioned in the press as victims of politically motivated audits. The Joint Committee staff has difficulty in discussing these cases specifically because of the problem this would present in violating the individuals' rights of confidentiality. *However, in none of these cases has the staff found any evidence that the taxpayer was unfairly treated by the Internal Revenue Service because of political views or activities.* If the staff were freed from restraint as to disclosure of information, it believes the information it has would indicate that these taxpayers were treated in the same manner as taxpayers generally. (JRC 12.) [Emphasis added.]

This conclusion is further supported by the House Judiciary Committee's materials. Commissioner Walters stated in his affidavit on May 6, 1974, with respect to the list furnished him by Dean:

> At no time did I furnish any name or names from the list to anyone, nor did I request any IRS employee or official to take any action with respect to the list.
>
> I removed the list from the safe when I left IRS and thereafter personally kept it in the sealed envelope and locked in my present office. (Special staff presentation, book VIII, tab. 22.1, pp. 240–241.)

The absurdity of the charges of Presidential misuse of the IRS against enemies is further highlighted by an illustration revealed in the Joint Committee's report when in discussing the audit of Robert W. Greene, a reporter for *Newsday*, it stated:

> In this case, Dean stated that John Caulfield had initiated an audit with an informant's letter. According to statements made by Greene, however, his return was not audited by the Internal Revenue Service but rather by New York State under the Federal/State exchange program. The staff has talked with Mr. Greene, the New York revenue agent who audited Greene's State return, and other people in the New York State Department of Taxation and, as a result, believes that his audit by New York State was unrelated to his being classified as a White House enemy. (JRC 12.)

The second key point to be emphasized in Dean's original charges concerns the alleged desire of the White House to "do something about audits that were being performed on friends of President Nixon who felt that they were being harassed by the IRS." (JCR 1.) On the face of the statement, there is nothing improper for either the President or any other citizen to be concerned about any other citizen's

charge of harassment by a Government agency. The President, in fact, has a mandate to prevent such harassment. However, even if we were to assume that this concern, supposedly expressed to Mr. Dean, through Mr. Haldeman, Mr. Higby, or the President, in some manner,[16] somehow acquires a sinister implication, the actions do not support that implication. The Joint Committee staff report found:

> Statements have also been made that on occasion names on the sensitive case list have been seen by those on the White House staff and that requests have been made not to harass or otherwise bear down too hard on cases involving friends. It is clear from information available that in two or three of the cases such requests were made by White House personnel. In one case, to demonstrate that there was no harassment, a special study was made by the Internal Revenue Service to show that the returns of others in the same industry were given at least as much attention as was the return of the taxpayer in question. In another case it is clear that there was a communication from the Commissioner of Internal Revenue to a District Director and to the agent working on the return regarding a friend's return. On the other hand, in the case of one friend an indictment has been obtained, and in another case the audit is continuing. In another situation, the Government did not prosecute a case involving a prominent friend. Questions may be raised as to whether this was the appropriate action.
>
> In reviewing the returns, the staff finds it difficult to secondguess the agents who were actually performing the audits. *The staff believes that in 3 cases there are substantial questions about friends of the White House, but the staff does not have evidence that there was any pressure involved.* With the approval of the committee, the staff has requested the IRS to reexamine these cases and to present analyses showing why it believes further action should, or should not, be taken.
>
> While the staff is not yet satisfied as to some of the cases involving friends, *the staff also believes that a number of enemies either were not audited when the staff believes they should have been or were audited too leniently.* (JCR 13.) [Emphasis added.]

Thus, there are absolutely no facts to substantiate any charge that the President in any way misused or directed the misuse of the IRS to either harm his enemies or to benefit his friends.

What becomes quite obvious when reviewing the House Judiciary Committee's exhibits is the fact that John Dean was the key actor and instigator of any apparent efforts to improperly utilize the IRS that did occur in the Nixon administration. In terms of actually achieving any improper influence, Dean's efforts (mainly carried out through the assistance of Mr. John Caulfield) seem to have achieved nothing.

The thrust of the alleged abuses involved minimal efforts of a very preliminary nature: a suggestion memo (special staff presentation, book VIII, tabs 5, 18, and 19), a preliminary investigation (special staff presentation, book VIII, tabs 6, 10, and 15), or a proposed action (special staff presentation, book VIII, tabs 3, 7, 8, 9, 13, and 16). The only improperly motivated efforts that did occur involved memos from one party to another party urging that something happen. However, a review of all the facts reveals that nothing ever did happen.

In his testimony before the House Judiciary Committee Dean noted that "He [the President] made some rather specific comments to me, which in turn resulted in me going back to [Commissioner] Walters again." (Dean HJC 3523.) This testimony implies that the President was attempting to have McGovern campaign supporters on the enemies

[16] There appears to be a major discrepancy in Dean's testimony concerning the time sequence on this matter. The Caulfield memo to Dean on Billy Graham was dated Sept. 30, 1971. (Special staff presentation, book VIII, tab 11.1, p. 147.) Yet Dean claims the Presidential request occurred during the Sept. 15, 1972, Presidential meeting, 1 year later. (Special staff presentation, book VIII, tab 11.3, pp. 153–154.)

list audited by the IRS, and was attempting to direct Dean to do this. Yet in response to a question by Congressman Railsback: "[a]nd the extent of the President's knowledge about the requested audits?" (Dean HJC 3694) Dean stated:

> Mr. DEAN. Well, I can't tell you what prompted the discussion of the audit. I can only recall that that launches the President into a— into an extended discussion about the situation and about the Internal Revenue Service and not using it effectively and from there we immediately went to the fact that we were not using the entire apparatus of the Government effectively and the changes that would be made after the election. (Dean HJC 3694.)

Thus, Dean could not say what actually prompted the President's discussion of the IRS matter and Dean also never testified as to content of the President's comments. Dean admits, however, that in the September 11, 1972 meeting with Commissioner Walters he asserted "it [the request] doesn't come from the President," (Dean HJC 3696) and in fact he has also admitted that at the time of the September 11, 1972 meeting he had no personal knowledge of the President's involvement in this matter. (Dean HJC 3696–3697.) Yet after all this he implies that the President made some specific comments to him on September 15, 1972, resulting in Mr. Dean renewing his request to Commissioner Walters.

The fact of the matter is that when Dean returned to Commissioner Walters on September 25, he, according to Commissioner Walters, "inquired as to what progress I had made with respect to the list. I told him that no progress had been made." (Special staff presentation, book VIII, tab 26.1, p. 354.) Thus, Dean pursued this topic where he had left it on September 11, 1972, before any alleged comments by the President on September 15, 1972. There is no evidence that this request was somehow a newly motivated one resulting from the meeting with the President. Quite the contrary, it was obviously a continuation of Dean's admitted efforts, prior to the Presidential conversation of September 15, 1972. When Congressman Railsback inquired as to what happened then and what did the President do as a result of the Dean "failure," Mr. Dean's response was:

> Mr. DEAN. Well, I have got to be very candid. I was happy it had been turned off. I didn't like it, and I didn't do anything more. I got continual—one of Mr. Ehrlichman's staff assistants, Mr. Hullin, continued to call me and ask me about it. And I think, I gather from a conversation I had with Mr. Walters that he had also called Mr. Walters and Mr. Walters was a little annoyed about it, but they kept resisting and resisting, so *I don't know if the President got back in it or not I don't know of any audits that were accomplished.* (Dean HJC 3696) [emphasis added].

Thus, Dean's claims of Presidential direction in Dean's efforts to misuse the IRS are contradicted by the sequence of events that point to no Presidential involvement, or interest in this matter. In any event, whatever it was the President said, the crucial fact is that nothing ever happened.

In conclusion, what the record clearly shows is that while some personnel at the White House may indeed have had improper intentions about what the IRS should do, and may in fact have communicated such intentions to their colleagues at the White House or to some individuals at the IRS, no abuse of the IRS ever occurred resulting from Presidential action. No action by the IRS resulted. No involvement of the President has ever been shown to be likely, let alone probable.

VI. CONCLUSION

For the foregoing reasons and in light of the complete absence of any conclusive evidence demonstrating Presidential wrongdoing sufficient to justify the grave action of impeachment, the Committee must conclude that a recommendation of impeachment is not justified.

Respectfully submitted,

Office of Special Counsel to the President.

AN ANALYSIS OF THE SCOPE OF AN ARTICLE OF IMPEACHMENT

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I. INTRODUCTION

Pursuant to H. Res. 803, the Committee on the Judiciary has been charged with the functions of reviewing all available evidence against the President of the United States and determining whether sufficient evidence exists to support one or more articles of impeachment. In making its recommendations to the full House of Representatives as to whether or not to impeach the President, the committee should be guided by several considerations concerning the legal and factual sufficiency of a proposed article of impeachment. This memorandum briefly examines the constitutional impeachment provision, the interplay of other constitutional provisions, legislative and judicial precedents, and practical considerations that govern the scope and limitations of a proposed article alleging an impeachable offense against a President.

II. THE HISTORICAL CONTEXT OF IMPEACHMENT

A. The Constitutional Origins

When the U.S. Constitution was completed, it was obvious from the document itself that one of the Framers' most basic concerns was the rule of law. The Framers, believing that arbitrary political power must be restrained in any good government, established a system of strictly limited powers; powers limited by the rule of law. In a phrase, a system of "due process" was established. It was a governmental system divided into three great functional branches, each to be supreme in its own sphere. Various checks and balances were included in this arrangement to preserve the separation of powers so that the liberties of the people might be more secure in that no one branch could ever achieve hegemony, and thus unrestrained power. Impeachment was one important device by which the legislative branch might protect the citizenry from the wrongdoing of officers of the executive and judiciary. It was a political proceeding of a judicial nature developed over the centuries by the English Parliament.

The Framers, however, adapted the English impeachment action to the purposes and requirements of the American constitutional system.[1] In doing so, the changes they made in the proceeding and the features they retained are highly indicative of the way in which they intended impeachment to be used and of the constitutional confines that should govern its use. Impeachment was not designed to be a vehicle for redistributing constitutional power or achieving legislative supremacy as it had been used in 17th century England. As the Supreme Court recently pointed out in *United States* v. *Brewster* (408 U.S. 501, 523 (1972)):

> The check-and-balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose. This may be explained in part because the third branch has intervened with neutral authority. See, for example, *United States* v. *Lovett*, (328 U.S. 303 (1946)). *The system of divided powers was expressly designed to check the abuses England experienced in the 16th to the 18th centuries.* [Emphasis added.]

To prevent the kind of political abuse illustrated by the use of impeachment and other state criminal trial processes in England from the 16th through the 18th centuries, the Framers made significant changes in the American constitutional device.

Under article I, section 3, clause 7 of the U.S. Constitution, no criminal sanction could result from impeachment and conviction. Nevertheless, the party to be subject to removal was first to have the benefit of a specification of guilt by the House of Representatives before a trial requiring a two-thirds vote of the Senate for conviction could

[1] As noted by the Supreme Court in *United States* v. *Brewster*, 408 U.S. 501, 508 (1972): "We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch."

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even be held. The Senate is required to be under oath when sitting as a court of impeachment, and the Constitution specifically limits the grounds for impeachment to "Treason, Bribery, or other high Crimes and Misdemeanors." (U.S. Constitution, art. II, sec. 4.) No longer would an officeholder be impeached as in England because of his religion or party affiliation. The great English impeachments of Lord Stafford, Lord Danby, and Fitz-Harris are particularly alien to the American ideal in this respect. See W. S. Holdsworth, 1 *A History of English Law*, 378–382 (Methuen & Co. Ltd. 6th ed. rev., 1938); 6 *A History of English Law*, 259–260 (Methuen & Co. Ltd. 6th ed. rev., 1938); Taswell-Langmead, *English Constitutional History*, 542 (Houghton, Mifflin, & Co., 1890); (39 *Cong. Rec.*, 3029 (1950)).

Finally, it should be noted that the Constitution in article I, section 9, clause 3 prohibited altogether the parliamentary device of a bill of attainder from being used by the Congress to legislatively punish the actions of any individual.[2] It should be remembered that in the period after 1459, the bill of attainder was a favorite alternative to impeachment by the English Parliament. (I Holdsworth *supra* at 381.) It involved fewer procedural safeguards than did English impeachment practice. Thus, the Framers' unequivocally rejected those elements of the English impeachment practice and history which denied a respondent fundamental notions of due process.

[2] The Supreme Court has ruled several legislative acts unconstitutional, finding that they were the equivalent of bills of attainder. See for example, *Ex parte Garland*, 4 Wall. (71 U.S.) 333 (1867); *United States* v. *Lovett*, 328 U.S. 303 (1946); *United States* v. *Brown*, 381 U.S. 437 (1965).

B. The American Context of Impeachment

What clearly emerges from the Constitution's historical context and its impeachment provisions is an overriding concern that "due process" be a guiding principle in an impeachment action.[3] The Constitution's concern with enunciating the grounds for impeachment under article II, section 4, lead inescapably to the conclusion that one important element of this due process is that the grounds for impeachment be made sufficiently specific for a respondent to be impeached. They must also be specific and explicit for the Senate to conduct a fair trial. That the impeachment process contemplated explicit charges of at least such a specific and definite character as would be legally sufficient in an ordinary criminal trial is clear from the criminal nature of the grounds enumerated in article II, section 4, as well as from the House of Representatives' consistent practice and usage of drafting factual articles of impeachment over the 187-year history of the Constitution.

During the last impeachment trial before the Senate, the trial of Judge Halsted L. Ritter in 1936, Mr. Manager Sumners, in speaking to a motion to strike one of the articles of impeachment made by Judge Ritter's counsel, conceded that:

> I assume that Senators are all familiar with the fact that we in this country drifted into the observance and followed the precedents of the English procedure when an impeachment trial was a criminal proceeding, with the possibility of a judgment involving the death penalty, confiscation of property, and so forth. Having no precedents of our own in the first case, we looked, as frequently occurred in the early days of the Republic, to the English procedure for our precedent. That is evidently how we fell into the application to our impeachment procedure of the procedure usually found to be observed in criminal cases. . . . *Proceedings of the United States Senate in the Trial of Impeachment of Halsted L. Ritter* 41, 74th Cong., 2d sess., Senate Document No. 200 [1936].

The article sought to be stricken in the Ritter case, article VII, was a catchall article that in part presented a general charge. Its inclusion was specifically justified on the grounds of the nature of judicial tenure. Mr. Manager Sumners noted:

> Members of this august body must, however, answer to the people every 6 years, because they are servants of the people. Members of the House of Representatives must answer to the people every 2 years. Every 4 years the people decide who shall be President.
>
> With regard to the judiciary, there is no place where they must answer except in this great body, and the Senate possesses all the powers that a free people enjoy in order to preserve a virtuous, efficient judiciary in America. That power must rest somewhere. It rests nowhere except here. . . .
>
> What does article VII charge? Article VII charges that the respondent by specifically alleged conduct has done those things the reasonable and probable consequences of which are to arouse a substantial doubt as to his judicial integrity.

[3] *Powell* v. *McCormack,* 395 U.S. 486 (1969) established that this same basic concept must also encompass the use of the House of Representatives' exclusion and expulsion powers.

We contend that that is the highest crime which a judge can commit on the bench. It is not whether or not the sum total of the things he has done has made the people doubt his integrity as a judicial officer.

I beg to make this practical suggestion: *That if a judge on the bench, who is in office during good behavior,* by his proven acts makes the people doubt whether his court is a court where they are going to get a square deal and whether it is an honest place to go to, the Senate cannot be technical. *Id.* at 42 [emphasis added].

In the impeachment trial of Judge Ritter, as in every previous American impeachment, it was clearly recognized that the impeachment proceeding was not beyond the confines of the Constitution's overall concern with due process. A most important element of this, of course, is that an article of impeachment set out a specific charge that clearly states the factual elements of the alleged criminal act. General charges do not meet the requirements of due process. The Ritter impeachment, while in no way negating the general requirements of due process, indicates that since judges serve "during good behavior" a more general catchall article of impeachment is permissible, one that enumerates those facts that indicate "bad" behavior.[4] Conversely, where an officer, such as the President, serves for a specific term via popular election, it is obvious that a general catchall article of impeachment reflecting "bad" behavior or an alleged abuse of office or failure to fully execute the laws is impermissible as it does not satisfy the legal requirements of the grounds of impeachment set forth in article II, section 4 of the Constitution. Such a general charge is not responsive to the intent of the Framers in enumerating the grounds for impeachment in the Constitution.

Even when the House of Representatives impeached President Andrew Johnson in 1868, in what may well have been one of the House of Representatives' most shameful moments,[5] it specified 11 separate articles of impeachment. Those articles each enumerated a number of facts and each dealt in a high degree of specificity with the alleged violation of one or two congressional acts or with certain speeches made by the President alleged to be violative of the Constitution. Even so it was the judgment of history and the Senate that the charges of the articles were crassly political and did not represent a good faith attempt at due process. If the issues involved in the current impeachment investigation are ever to be fairly resolved, then any charge, should a factual basis exist, must be sufficiently specific. Any article of impeachment must meet the requirements of due process mandated by the Constitution and inherent in its various impeachment provisions that allows the respondent impeached or charged with an impeachable offense a fair chance to defend against an article.

From the time Senator Blount was impeached in 1798 down to the last impeachment, that of Judge Ritter in 1936, every respondent charged has been faced with articles of impeachment that allege very specific factual actions within the scope of clearly defined transactions that violate some law or constitutional provision. In the past 100 years

[4] It should be noted that even in the Ritter impeachment, article VII was rather specific and set forth the factual acts upon which impeachment was based.

[5] *The Law of Presidential Impeachment,* Association of the Bar of the City of New York (1974) summarizes the generally accepted view "that the Johnson impeachment demonstrates the perils of treating impeachment as an invitation to purely political retribution" at p. 7. See also R. Berger, *Impeachment* 295 (Harvard University Press, 1973); I. Brant, *Impeachmment* 4 (Knopf, 1972).

the Judiciary Committee has never recommended impeachment without setting forth a specific factual situation to support a specific charge. The final report of every investigation by this committee into a possible impeachment has contained separate instances of alleged criminal misconduct for the separate charges: drunkenness, embezzlement, conspiracy to defraud, et cetera. In cases where the committee has investigated a charge as general as "usurpation of jurisdiction," it has recommended impeachment only when it found a single factual situation sufficient to justify the charge. For example, the Judiciary Committee in 1904 recommended in its report that Judge Charles Swayne be impeached for, among others, two broad charges of "oppression and tyranny," yet the committee supported each count with a single, separate example of alleged criminal misconduct. The committee has consistently followed this practice, whether its recommendations concerned a judge, a customs collector, or a minister to a foreign country. It would be a sharp break with both precedent and due process to allow Watergate to become a legal conclusion that may be substituted for factual charges against the President.

III. A PROPOSED ARTICLE OF IMPEACHMENT MUST ADHERE TO CONSTITUTIONAL PRESCRIPTIONS REQUIRING FUNDAMENTAL FAIRNESS

In general, a conglomerate or catchall article of impeachment reported by the House Judiciary Committee that purports to be supported by evidence of unrelated instances of alleged wrongdoing would violate settled principles of criminal law. Although the House Judiciary Committee acting in its impeachment role is substantially different in nature from a grand jury proceeding in that evidence is also presented by counsel for the respondent, the resulting recommendation voted out by both bodies is essentially the same—a charge of wrongdoing based on a review of evidence. As such the constitutional guidelines governing the issuance of a criminal indictment are equally analogous and applicable here. Since the committee is charged with recommending to the full House the advisability of impeaching the President, these guidelines, deemed essential to insure fundamental fairness to a respondent, are appropriate to consider at this stage of the proceeding.

A. Duplicity

Judicially recognized principles of due process regarding a formal criminal charge—an indictment—would be violated by a catchall or conglomerate charge of impeachment. Similarly, a general indictment or recommendation containing multiple charges within an individual count would also be void. When two or more separate crimes or acts are joined in a single count indictment, the charge is void as a result of duplicity, for a defendant is denied the right to a unanimous concurrence of the jury on each offense before he can be convicted.[6] *United States* v. *Warner*, 428 F. 2d 730, 735 (8th Cir.), *cert. denied*, 400 U.S. 930 (1970); *United States* v. *Bachman*, 164 F. Supp. 898, 900 (D.D.C. 1958).

The vice of duplicity is twofold. First, there is no way in which a jury can convict a respondent of one offense and acquit him of another offense if both offenses are contained within the same count. *United States* v. *Shackelford*, 180 F. Supp. 857, 859–860 (S.D.N.Y. 1957); C. Wright, 1 *Federal Practice and Procedures* § 142 at 311 (1969). Second, by joining numerous charges within the same count, none of which individually may be supported by the necessary concurrence of the jury or committee, a conviction in almost every instance could be insured. Thus, for example, in the present situation by utilizing a conglomerate charge, one Congressman could vote for a bill of impeachment based on his interpretation of evidence concerning Watergate while, on the same vote, another Member could vote for impeachment based on evidence concerning the "milk" incident, although both charges individually may lack the necessary majority vote. Such a situation has never been tolerated in the areas of criminal or civil law and should not be permitted here.[7]

[6] Rule 8(a), Federal Rules of Criminal Procedure provides:

Rule 8. Joinder of Offenses and of Defendants: (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

[7] This is precisely the danger that the noted constitutional scholar Charles Black, Jr., warns of in his recent book *Impeachment—A Handbook* (Yale Univ. Press, 1974) at 48.

B. Prejudicial Joinder

A broad one-count impeachment charge based on purported evidence of distinct and separate areas of alleged wrongdoing would also be objectionable on the ground that such a procedure permits the cumulative use of evidence. The danger of prejudicial joinder of offenses was stated by Judge Learned Hand in *United States* v. *Lotsch* 102 F. 2d 35, 36 (2d Cir.), *cert. denied* 307 U.S. 622 (1939):

> There is indeed always a danger when several crimes are tied together, that the jury will use the evidence cumulative; that is, that although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all.

Under rule 14 of the Federal Rules of Criminal Procedure, prejudicial joinder is specifically prohibited.[8]

Normally, joinder can be cured prior to trial by moving under rule 14 for a separate trial of those offenses that would prejudice the trial of the accused if all of the offenses were tried at the same time. In the present impeachment proceeding, a separate trial would neither be practicable or available. Therefore, it is particularly critical, at a minimum, to insure that distinct areas of alleged wrongdoing be considered separately to avoid a prejudicial joinder of offenses in the minds of those sitting in judgment, and to insure that each Member of the House has an adequate opportunity to vote individually on each area of alleged wrongdoing.

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[8] Rule 14, Federal Rules of Criminal Procedure provides:

Relief from Prejudicial Joinder: If it appears that a defendant or the Government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. . . . (as amended Feb. 28, 1966, eff. July 1, 1966).

Jury instructions are also utilized to reduce the possible prejudicial effect of even a separate multiple count indictment. See *Dewitt* and *Blackmar, 1 Federal Jury Practice and Instructions*, § 17.02 at 318 (1970).

C. Fundamental Due Process

It is now beyond peradventure that procedural due process rights attach whenever governmental action threatens to condemn a person to suffer a grievous loss of any kind.[9] *McNeill* v. *Butz*, 480 F. 2d 314, 318 (4th Cir. 1973); see, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Fair play is the essence of due process. *Galvan* v. *Press*, 347 U.S. 522, 530, *reh. denied*, 348 U.S. 852 (1954). Two fundamental principles or minimum requirements of due process are notice and an opportunity to be heard or to defend. *Aetna Ins. Co.* v. *Hartshorn*, 477 F. 2d 97, 100 (5th Cir. 1973). The right to a full hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party in order to be able to defend against them. *Morgan* v. *United States*, 304 U.S. 1, 18 (1938). (Administrative proceeding of a quasi-judicial character held to require rudiments of fair play.) If, in the impeachment proceeding, an overbroad impeachment article that does not specify a precise offense is drawn, upon evidence that allegedly supports many different and separate offenses, then a denial of due process would result. The respondent would not have a reasonable opportunity to defend himself, a fundamental element of due process, for the exact nature of the charge or charges against him would not be known.

In fact, if an article of impeachment were drawn broad enough, the danger would exist that different Members could vote on a charge of alleged wrongdoing not found specifically in the impeachment article but which could perhaps be constructed from the supporting impeachment evidence. Thus, the President could theoretically be impeached on a charge not specifically delineated. In the criminal law, a conviction on a charge not made is a total denial of due process. *De Jonge* v. *Oregon*, 299 U.S. 353, 362 (1937); *United States* v. *Schneiderman*, 102 F. Supp. 87, 97 (S.D. Cal. 1951). The language of Chief Justice Waite in *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1875), discussing the necessity for accused to be furnished a description of the charge against him so he can defend himself, bears repeating:

> A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

It is beyond question that in an impeachment proceeding, fundamental fairness must be accorded to the President of the United States. Such fairness would be denied unless an impeachment charge is specific and definite as to the nature of the offense charged.

[9] For example, it is now well established that the right of participation is an essential element of due process in any proceeding where an individual's "property" or "reputation" may be adversely affected. *Goldberg* v. *Kelly*, 397 U.S. 254, 270–271 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67, *reh. denied*, 409 U.S. 902 (1972); *Bell* v. *Burson*, 402 U.S. 535 (1971); cf. *Board of Regents* v. *Roth*, 408 U.S. 567, 573 (1972) and *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971).

D. Sixth Amendment Considerations

An article of impeachment that does not designate with specificity the precise charge alleged also violates the basic tenets of the sixth amendment. Although the sixth amendment deals primarily with criminal prosecutions, the rights of a respondent under a criminal indictment are substantially analogous to the rights of a respondent confronted with an article of impeachment. The sixth amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation * * *." Courts have interpreted the sixth amendment as imposing the requirement that indictments must cover all the essential elements of the offense in order that the accused may know the charge against him in order to permit him to make a proper defense. *United States* v. *Auerbach*, 420 F. 2d 921, 923 (5th Cir. 1969), *reh. denied*, 423 F. 2d 686, *cert. denied*, 399 U.S. 905 (1970); *Carter* v. *United States*, 173 F. 2d 685, 687 (10th Cir.), *cert. denied*, 337 U.S. 946 (1969). As the Supreme Court stated in *Russell* v. *United States*, 369 U.S. 749, 763 (1962), the indictment must contain "the elements of the offense intended to be charged and sufficiently apprise the defendant of what he must be prepared to meet." Rule 7(c), Federal Rules of Criminal Procedure, provides in part that: "the indictment or the information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged * * *." A broad impeachment charge that does not explicitly define an impeachable offense would fall far short of the very basic constitutional protection afforded by the sixth amendment.

E. Practical Implications

In addition to the reasons stated above, there is a simple and very practical reason why a general or conglomerate charge should not be issued by the Committee on the Judiciary in an impeachment proceeding. An unspecified general charge would negate entirely the usefulness and primary purpose of the full House initially referring an impeachment inquiry to the Judiciary Committee.

The committee in this instance has two primary functions: that of initially reviewing all available evidence to determine the validity of charges against the respondent, and that of making concrete recommendations to the House as a whole as to which, if any, areas of inquiry certain sufficient evidence to support one or more articles of impeachment. It is critically important that the committee thoroughly and accurately set forth the factual findings developed by its inquiry. It is equally important, however, that the committee's response contain specific recommendations as to whether a sufficient basis exists to support any allegation of impeachable conduct.

A specific and detailed recommendation serves two purposes. First, it delineates those areas which the committee has found do not contain sufficient evidence to support a charge. By disposing of these areas of inquiry which upon analysis do not contain an impeachable offense, the House of Representatives is better able to concentrate on those charges, if any, which may ultimately justify the removal of the President. The impeachment inquiry is expedited by the removal of collateral issues and the respondent is not burdened with the obligation of responding to charges that are lacking in substance.

Second, a specific and detailed recommendation from the committee to the full House is essential to enable the House to draft appropriate articles of impeachment should it become necessary. Should a factual basis exist in any area of inquiry sufficient to impeach the respondent, it must be remembered that the House bears the burden of presenting specific articles of impeachment to the Senate. These articles, similar in nature to a criminal indictment, must set forth with specificity the particular acts of the respondent which constitute an impeachable offense. Therefore, a general recommendation by the committee which does not delineate the particular impeachable act committed by the respondent, is of little or no assistance to the House. This is particularly true in this proceeding where the evidence gathered by the committee is voluminous and the areas of inquiry widely diverse.

If there is a sufficient basis for impeachment, the committee can best serve the interests of the House and all parties involved, by making its recommendations and findings as specific and concrete as the ultimate articles of impeachment must be, should they become necessary. However, it would be a grave injustice to both the respondents

and the entire House for any committee to recommend impeachment in the form of a general resolution due to the committee's own inability to identify any specific act or acts committed by the respondent which constitute an impeachable crime. If the Committee on the Judiciary, the congressional committee most familiar with the evidence, is unable to frame its recommendation with sufficient specificity to constitute an article of impeachment, it is unreasonable to assume that the House could do otherwise. Therefore, as a practical matter, it is of the utmost importance that the committee avoid a general charge of impeachment but rather frame its recommendations in the specific and concrete manner constitutionally required.

IV. CONCLUSION

In light of our constitutional history, legislative and judicial precedents, traditional notions of due process and fairplay and sound and sensible practical considerations it is demonstrably clear and critically important that any article of impeachment recommended by the Committee on the Judiciary must be set forth with sufficient specificity to afford the respondent the full panoply of safeguards required by our Constitution.

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